**Case No. 84221**

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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CITY OF LAS VEGAS, a political subdivision of the State of Nevada,

*Petitioner,*

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the Honorable Timothy C. Williams, District Judge,

*Respondents,*

and

180 LAND CO, LLC, a Nevada limited-liability company, FORE STARS LTD., a Nevada limited-liability company,

*Real Parties in Interest.*



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Eighth Judicial District Court, Clark County, Nevada
Case No. A-17-758528-J
Honorable Timothy C. Williams, Department 16

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# APPENDIX TO ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI

## VOLUME 24

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**LAW OFFICES OF KERMITT L. WATERS**
KERMITT L. WATERS, ESQ., NBN 2571
kermitt@kermittwaters.com
JAMES J. LEAVITT, ESQ., NBN 6032
jim@kermittwaters.com
MICHAEL SCHNEIDER, ESQ., NBN 8887
michael@kermittwaters.com
AUTUMN L. WATERS, ESQ., NBN 8917
autumn@kermittwaters.com
704 S. 9th Street, Las Vegas, Nevada 89101
Telephone: (702) 733-8877/ Facsimile: (702) 731-1964
*Attorneys for 180 Land Co, LLC and Fore Stars Ltd.*

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI - **VOLUME 24** was filed electronically with the Nevada Supreme Court on the 8th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

**McDONALD CARANO LLP**
George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

**SHUTE, MIHALY & WEINBERGER, LLP**
Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

**LAS VEGAS CITY ATTORNEY'S OFFICE**
Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

*/s/ Sandy Guerra*
An Employee of the Law Offices of Kermitt L. Water

and authorized the public to enter that air space, which is exactly what Bill 2018-24 does.

And, Your Honor, the Government's argument that, hey, we haven't enforced that is a non-starter, because as we stated, and we read that statute, the general provision says that section G *shall* apply to this landowner, and section G is where that ongoing access appears.

Your Honor, I'm not going to -- we've gone through all this, so I'm going to skip up because we did that before.

If we could turn to page 75. Page 75 is this right here (indicating), the landowners' plan for this 35-acre property. As you'll recall, the landowners attempted to develop the property as the city told him to, and the city denied that application.

We turn to page 76. There's the plan. It's half dense of everything else around the area. It met every single city requirement that there possibly could have been, and the city denied it.

So let's turn to page 77 here. What was the city's argument on page 77 for denying this 35-acre application, this stand-alone application? They said, Judge, we think they filed the wrong applications. That was counsel's argument. He said, Judge, the city was justified in denying the 35-acre applications because they filed the wrong applications. There's two problems with that. Number one, the city dictates the

applications; and secondly, this new-found argument that the city makes, that the landowners filed the wrong applications, appears nowhere in the hearing minutes, and it appears nowhere in the 35-acre denial letter.

Turn to the next page -- I'm sorry, Your Honor, if you could please follow me to the next page, page 78, this is the letter the city sent which denied the 35-acre applications. It's Exhibit 93. What they say is there is, Listen, you're going to impact the surrounding residents if you build, so we're not going to let you build, and also we need you to submit a master development agreement.

You know what's not in this denial letter, is counsel's new-found argument to you in this case that the landowners filed the wrong applications. I'll say it, Your Honor, that is an entirely invented argument that has no basis in fact and no evidence at all. It wasn't stated anywhere during their hearings, and it wasn't stated in the letter. They made it up for this purpose of this trial.

I'll just go to the next -- we'll go to the next tab, tab number 8. This is the Master Development Agreement. As you'll recall, the city denied the Master Development Agreement, which, again, remember the city said, Hey, we're only going to do a master development agreement. The landowners tried the 35-acre application, then they went back to the Master Development Agreement, and the city denied it.

Turn to page 81. This was the city's new-found argument on why the MDA, the Master Development was denied. They said you filed the wrong applications, Landowner. There's three problems with that. Number one, the city dictates the applications to file; number two, the evidence shows that the city drafted the Master Development Agreement; and number three, that wrong applications argument that the city is trying to present to you here today was never mentioned in the minutes, and it doesn't appear in the denial letter.

Page 82 is the affidavit of the landowner where he says, The City didn't ask us to change anything. They didn't ask for more concessions. They didn't ask for setbacks. They didn't ask for reducing anymore acres after they denied the MDA, they just rejected the MDA all together.

And, Judge, if I could pause here for just a moment. As this Court will recall, what the city made the landowner do under the Master Development Agreement, two and a half years. Do you know that there's a statute, NRS 278, that says once a landowner submits an application, the city is supposed to consider it in 90 days? The city denied -- or delayed this master development application for two and a half years. The city demanded outrageous concessions. I'll remind the Court, the city said you got to build new gates for Queens Ridge; you got to build an equestrian facility; you got to build a 70-acre park. And remember they handed him that letter and he signed it

and sent it right back to them, "As long as I can build." They made him pay an extra one million dollars just in application fees, above what everybody else in the valley would have to pay, and then they guaranteed it was going to be approved.

**THE COURT:** And as far as the 70 acres, would that have been set aside as open spaces?

**MR. LEAVITT:** Your Honor, it was actually going to be a park. It was going to be a park. Now, he would have owned it, but he said, Listen -- and Your Honor, if you look right here, in his plan here (indicating): Here's a park, here's a park, here's a park.

He was meeting -- you see this in other developments. They say, Hey, if you're going to build 61 homes, you got to have a couple parks; you see that all through Summerlin; you see it all through Green Valley. Build a couple parks here and you can build your development. So absolutely.

But I'll tell you, Judge, requiring 70 acres out of a 250-acre development is pretty onerous. Requiring him to build gates for the Queens Ridge community that he has nothing to do with, that's like, Your Honor, you go to build --

**THE COURT:** No, I get it.

**MR. LEAVITT:** Oh, you got it, okay?

**THE COURT:** I get it.

**MR. LEAVITT:** All right. I had a good example, but if you --

**THE COURT:** Yeah, I understand, I do.

**MR. LEAVITT:** And then so the landowner --

**THE COURT:** If you want to use the example for the record for a reviewing court to look at, you can do that.

**MR. LEAVITT:** You can.

**THE COURT:** You can, I'm just giving you the opportunity. Because, remember, you're not just arguing for me, potentially you're arguing to an appellate court.

**MR. LEAVITT:** Absolutely. But even though the city could not require him to do that, Your Honor, he agreed to do it. That's how badly he wanted to develop this property.

And then the Master Development Agreement that the city wrote, it's presented to the city for approval, and the city denies it, denies the Master Development Agreement that the city itself wrote.

**MR. MOLINA:** Your Honor, I got to object to that. The city did not write the Development Agreement.

**MR. LEAVITT:** I understood the objection. Just the response is, Your Honor, we submitted the documentation and the exhibits showing that the request to change were all made by the city. And I agree with counsel that there was interchange back and forth, but at the end of the day it was the City Attorneys' Office and the Planning Department that provided the last draft on what was to be approved.

Now, if we turn to page 83, let's just take a moment,

Your Honor, and accept the city's new-found argument that the wrong applications were filed for the 35-acre stand-alone application, or the MDA. If that argument is true, then the city perpetuated a profound -- I call it bad faith. I'm using a pretty simple or a pretty -- well, it should be a lot stronger word than that. They perpetuated a profound bad faith on the landowner for all the years the landowners tried to develop, because this is what the city told the landowners they had to do. All these years the city dictated the applications, and if the city is now saying that the applications were wrong, then the city acted in bad faith towards the landowners over all those years. And you know what Justice Stevens says about that bad faith? That it makes the landowners taking claim, quote, "Much more formidable," end quote.

When the Government -- he also said when the Government targets a landowner's property, when they act in bad faith and they target a landowner's property, Justice Stevens and the United States Supreme Court says, Listen, we're looking at that a lot closer. That makes the claim much more formidable.

We had a lot of discussion on the fence, Your Honor. Remember the city denied the fence? And I remember the city's excuses. I want to spend just a quick minute on this. The city perpetuated its denial of all the use of the property when it denied the fence. This is page 84.

Remember in *Cedar Point Nursery*, the United States Supreme Court said, Listen, the right to exclude is one of the most essential sticks in the bundle. The right to put up a fence is one of the most essential sticks in the bundle.

The landowners, as you'll recall, went up to the city and said, Listen, we want a fence here. And as you'll recall the city said, We're not going to let you have a minor review of your fence because of the surrounding property owners. We're going to require you to go through a major review. That's page 85, Your Honor.

The problem with that argument is, number one, the City Code says that a fence must be reviewed under a minor review. The fence application cannot be reviewed under a major review, and therefore the city violated its own code when it required a major review.

The next page is that city code, page 86. Las Vegas Municipal Code 19.16.100 says building permit level review, minor site development. It says that the -- and if you go down there, it says the construction types eligible for minor treatment are as follows: 1, 2, 3. You can see on-site signs, walls and fences. Makes sense. If you're going to put up a fence, it will be a minor review, you shouldn't have to go through the same review the Bellagio goes through. It's a fence.

Then in section 3, it says review by counsel, which is

the major review. And the last sentence of that review by counsel says, "The provisions of this paragraph 3, review by counsel, shall not apply to building permit level reviews described in paragraph 2A of this section F." The City violated its own code when it went to the landowners and said, You can't build a fence; You can't -- we're not letting you go through the minor review, you have to go through the Bellagio major review.

Then you turn to page 87 and we have the city's excuse. This was said on Friday, Your Honor. Counsel for the city says, well, the city must have succumbed to, quote, "political pressure," end quote. Or, stated another way, the city just didn't want the fence put up around the landowners' property because they were preserving that property for the surrounding property owners, and they wanted the surrounding property owners to continue to go onto the property - exactly as the councilman said, exactly as the bill was proposed, and exactly as Bill 2018-24 said. That's their pattern of conduct in this case, announced to the public that the 35-acre property is their recreation and adopt a bill to do it.

Now, this clearly was a taking action. It prohibited the landowners from excluding others, it allowed the public to enter, and it exposed the landowner not only to people coming on there, but significant liability. And you remember the city says, Well, Judge, The ponds are empty. That's worse. You got

a 30-foot drop now. Do you know that our managing, or the landowners' manager out there, his first thing every morning is to get into his UTV vehicle and make sure no one fell into the ponds. That's his number one job.

**THE COURT:** So we're talking about a 30-foot drop?

**MR. LEAVITT:** I believe that's what they represented to me. It's to the bottom, we can find out, but it's a large drop down into the pond, and then I believe it goes down to 30 feet. I may be wrong. Judge, let me say this for the record. I'm not sure if it's 30 feet. I'll assume it's only 10 feet. A 10 feet drop is still far enough to crack my head open.

And so we have this exposure to liability, we have the right to fence our property, and we're being prohibited from doing it, unlike everybody else in the valley.

Page 89, Your Honor --

**THE COURT:** And even under those facts, assuming it has water in it, there's no question it's potentially in the tract of nuisance that would place a landowner in a position where they had potential liability if some unfortunate event happened, just as important if it's empty, and if there's a five-foot drop or a ten-foot drop. I mean, a drop is a drop, and that's significant, where a person could suffer bodily injury.

**MR. LEAVITT:** And that was our concern, Your Honor.

And do you know that that was the landowners' number one concern?

If we turn to page 89, Your Honor, these are current pictures, and I'll ask the Court to take judicial notice of these current pictures. New Horizon Academy on West Charleston Boulevard got a fence.

Next page, 90, Leslie Pool Supply on West Charleston is closed. They got a fence.

Page 91, vacant land on West Charleston, they got a fence, just to exclude others and to protect it.

And this one is page 92, and I'll represent to you that the landowners own this property right next door to the Supreme Court building. They have equipment there which is just stored, and they have a fence around it.

So a fence was permitted for all of these other people in the city but not for our landowner.

And I heard something stated the other day. They said, Well, Judge, a fence wasn't really aesthetic. It was temporary until the landowners would build. They wanted to protect it immediately. You can put a chain link fence up immediately like everybody else in the valley was permitted to do. And they said, Well, it wasn't very aesthetic. Well, apparently a chain link fence is good enough for our Nevada Supreme Court but not the surrounding property owners, is what the government was arguing to you the other today.

And, Your Honor, on page 93 --

**THE COURT:** And I don't mind saying this, my thoughts are when it comes to health and safety issues, better to have a temporary fence in place, a structure, a fixture, until the ultimate resolution or case resolution occurs or until there's some sort of agreement with the city.

**MR. LEAVITT:** And that's what we tried, Your Honor.

And so I'll go to -- I already discussed 93.

Turn to page 94, the access issue. I'll be quick on this because we discussed it, Your Honor. But as you'll recall, *State -- Schwartz -v- State* says the landowners have a property right in access.

The Government in this case conceded during discovery, which becomes the facts of the case, that the badlands had legal access. This is what they admitted to: The landowners here on 35-acre property had legal access right here (indicating). That's what they wanted when they filed their application. They said, We want to use our legal access. Here's how we get to the property right here (indicating). We front Hualapai. We want to get onto the property for access purposes.

And as you'll recall, on page 95, the city sent the landowner a letter saying, You can't have it; we're not going to let you do a minor review; you got to go through the Bellagio major review. Why? Because they were preserving that property for the public.

And on page 96, Your Honor, I already discussed this, what was the impact of all these city actions? What was the impact of denying the 35-acre application, denying the Master Development Agreement, denying the fence, denying the access, telling the public that this is their property to use and then adopting a bill making it impossible to build? What was the impact of all these city's aggregate of actions? It's on page 96, I already discussed it, we already went through, Mr. DiFederico appraiser, Exhibit No. 183, said the impact is there is no value left.

Now, Your Honor, I do want to spend just a minute --

**THE COURT:** I want to make sure I understand the status of the evidence.

**MR. LEAVITT:** Yes.

**THE COURT:** There's no rebuttal to that.

**MR. LEAVITT:** None. And discovery closed two months ago. We're set for a trial October 25th, I believe your October 25th five-week stack.

There are four arguments the Government made, Your Honor, and I'll quickly move through each one of these arguments. I'll spend maybe three to five minutes on each of the arguments.

The first -- the next argument the Government makes is the ripeness argument. The Government says, Listen, the Landowners claims are not ripe, that's page 108. This exact

argument was previously presented to this Court. On page 109 is this Court's decision.

And, Judge, I'm just merely reminding the Court that this issue has already been litigated and decided. This Court held, in its order entered February 1, 2018, that the landowners' claims are ripe because 180 Land obtained a final decision from the city regarding the property at issue and a final decision by the responsible agency, informs the constitutional determination whether a regulation has deprived the landowner of all economic beneficial use of her property, of the property. You've already found this. You already rejected the city's ripeness argument.

Now, ripeness and futility go together, okay, they're one in the same. The Court decides whether ripeness applies in this case and then has to look at the facts and decide whether, hey, the claims are ripe. But the Nevada Supreme Court said to the landowners' three claims that we're moving for summary judgment motion on, the *per se* categorical, the *per se* regulatory, and the non-regulatory, that this ripeness analysis doesn't even apply. You don't have to go to the Government if it's already denied you all economic viable use. You don't have to file an application with the Government if they adopt a bill like in *Sisolak* that authorizes the public to get into your property. You don't have to go to the Government and file an application to ripen your claims or to determine futility if the

Government substantially, already substantially interfered with the use and enjoyment of your property. And, Your Honor, that's page 110. We can go through those cases, but the Court has already read *Sisolak*, I believe the Court has already read *Sue, and the State -v- Eighth Judicial District Court* case. The Nevada Supreme Court was not unclear there.

**THE COURT:** Well, again, as far as the ripeness issue and especially futility, I think that was pretty clear in *Sisolak*.

**MR. LEAVITT:** Very clear in *Sisolak*. In *Sisolak*, the Court said, the last sentence of the paragraph where they're talking about ripeness, they said Mr. Sisolak was not required to exhaust his administrative remedies because the city already adopted the bill. The height restriction ordinance, that when you're talking about a *per se* regulatory taking, that's a *per se* taking in and of itself. Ripeness and futility is not a defense.

And something was said -- well, I'll just say that the only place -- because there is a lot of body of law on this ripeness and futility issue. The Court said the only place that applies is a *Penn Central* case. Why? Because in *Penn Central* you're balancing three factors. You're looking at the economic impact to the landowner, the interference with investment-backed expectations, and the character of the government action.

So when you're analyzing those three prongs, which we submit are met under the facts of this case, but when you are analyzing those three prongs, then you apply ripeness and futility. But you absolutely do not apply it to the three claims the landowners are moving for summary judgment on, and the Nevada Supreme Court could not have been clearer on that issue.

And page 111, Your Honor, is the ripeness and futility standard. You remember counsel said that you need to have two applications. You know that law appears nowhere in the state of Nevada. All Nevada says is if you are going to analyze a ripeness analysis under a *Penn Central* case, then all you need is a final decision regarding the application at issue.

And then the Court said you don't even need to file an application if you can show it's futile, that next number 2 there: When exhaustion of available remedies, including the finding of a land use application is futile, the matter is deemed ripe for review. But, again, it doesn't matter here, because we're not -- we're moving for summary judgment on three claims, Your Honor that ripeness and futility do not apply to.

Again, I'll turn to page 112 here, Your Honor. I just will note for the Court that four denials and adopting a bill to prohibit use of the property and force the landowners to allow public to enter the property, I think meets ripeness by about 34 country miles, even if we were going to apply it. And

when you look at the aggregate of the Government's actions, it's clearly met.

I'm going to move forward, Your Honor, to rebuttal of segmentation. If you can go to that next tab where the city argues this segmentation. And I'm going to use this (indicating). Here's the segmentation argument that the City makes. The city says, Judge, we've met -- we approved an application on the 17 acres, therefore we get 233 acres for free. That's the argument. You know that's never been the law. Never has. Number one, segmentation would only apply in a *Penn Central* case. That's the only place it applies.

But Nevada expressly rejected this segmentation argument in a case called *City of North Las Vegas versus Eighth Judicial*. It's page 116, Your Honor, and there is the Nevada Supreme Court holding: A question often arises as to how to determine what areas or portions of the parcel being condemned and what constitutes separate and independent parcels. And the Court said, The legal units into which a land has been divided control that issue. That is, each legal unit, typically a tax parcel, is treated as a separate parcel. That's a 2017 decision.

So the Nevada Supreme Court said, Well, what we're not going to let the city do is look at the whole Peccole Ranch area and say, We only have to allow some people to build, and we can take everyone else's property under segmentation. They

also said we're not going to let the Government get 233 acres for free just because they approved something on 17 acres. They said you have to look at the properties differently. Again, that prevents the Government from saying, Hey, I let property owner A build, so now I don't have to let property owner B build.

**THE COURT:** Even if you have segmentation anyway, for example, the property here would be designated as not PROS, but it's actually RPD-7.

**MR. LEAVITT:** That's absolutely correct, Your Honor, and that's why you can't even have the segmentation. Because what the Government's segmentation argument is, all we have to do is let you build here and we can get the rest of this open space for free. You can't do that because, number one, this property is zoned RPD-7; number two, this property has separate ownership.

**THE COURT:** No, I understand that.

**MR. LEAVITT:** For our legal -- now, the Government is going to say, Well, it's the same people.

For purposes of the law --

**THE COURT:** It's -- I mean, I'm looking at the pleading in this matter, and understand the way title is held it does have a meaning for a lot of different reasons, and it's my understanding it's 180 Land Company.

**MR. LEAVITT:** That's absolutely correct.

And, Your Honor, I will point out, remember we went through NRS 37.039 that says if the Government wants to force somebody's property to remain open space, they have to pay for it. So the Nevada legislature says you don't get to say this is developable, but the 233 acres is open space. We talked about the statute that prohibited that from happening.

Now, I'll spend one minute on the *Kelly Tahoe* case, because the Government said, Judge, *Kelly Tahoe* says that the segmentation argument applies. That's not what *Kelly Tahoe* said. *Kelly Tahoe* said Kelly had a 40-acre parcel and he split it up into, we'll say 40 different lots like this, and Tahoe approved the development. They said you can build 36 of them now, but we're going to make you wait on four of them. Secondly, the appraiser said the property had significant value. Kelly tried to say, Hey, you've stopped these four lots from being developed and you've delayed them, therefore, I want you to pay me for that. And the Court said that's not a denial of all economic viable use, number one, and number two, your property has to be looked at as a whole.

The *Kelly* case is this; number one, the city approved this; number 2, the city then said, Hey, we have these four lots here. If you develop those in like one year instead of later, that's the *Kelly* case. If the Government had approved this development and said, Hey, just take these four right here and develop them later, we wouldn't be here today. That's what

happened in *Kelly*. And what the Court said is this, *Kelly* tried to say this was just a taking by not allowing me to develop those immediately. And the Court said no, you have to look at this whole subdivision, and we're letting you do it all, it has a significant value, but we're just delaying that.

So *Kelly* was an approval case where the Court found that there was not a denial of all economic viable use. It has zero application here.

What the Government is trying to do is compare this (indicating) to a 250-acre parcel and say as long as -- actually, if you take the Government's argument on segmentation, Judge, if the Government lets the landowner build an acre here (indicating), the Government gets 249 for free. He'll admit that. They'll say, yeah, that's what segmentation means. That's an outrageous argument which has never been accepted in the state of Nevada.

Your Honor, I'm going to -- I'm going to move to my final argument here, because this permeated the city's entire argument. It's called rebuttal of the removing take.

**THE COURT:** You just need what, another 15?

**MR. LEAVITT:** Yeah, if I could have another 15, I'll be happy.

**THE COURT:** Yeah, we'll take a break at 11:00.

**MR. LEAVITT:** So rebuttal of removing take, that tab, and it's right here. So what the city says to you is they say,

Judge, we sent the landowner a letter and we said, Oh, you can build now. They lost seven motions to dismiss, they lost several other issues, and once they saw liability coming, they said, Judge, here's a letter saying they can build. That was done in *Nick*.

In the *Nick* case, the Township of Scott responded to the lawsuit by staying enforcement of the ordinance. In the *Nick* case, Your Honor, Ms. Nick filed the lawsuit and the next day the Township of Scott stayed the ordinance.

In the *Del Monte Dunes* case, after denying Del Monte Dunes land use applications and being sued, the City of Monterey said, Hey, we'll allow you to develop now. This is the rule on the right-hand side (indicating): "Once the Government actions have worked at taking a property, no subsequent action by the Government can relieve it of the duty to provide compensation for the period during which the taking was in effect." They say -- these are quotes right out of the United States Supreme Court: "A property owner requires an irrevocable right to just compensation immediately upon a taking," and this is the example they use from the Court: A bank robber might give the loot back, but he still robbed the bank.

Here, the city hasn't even authorized the use of the property. It just sent the landowner a letter saying, Hey, everything is good. That's not the way it works, Your Honor. The way it works is you have a rule, and once you meet that

threshold of a taking, the landowner receives an irrevocable right to payment or just compensation, and there's absolutely nothing the Government can do to remove that. There's absolutely nothing the Government can do to erase a taking that already occurred.

That's why -- and this rule right here actually addresses the ripeness argument and the segmentation argument too, because the Government wants to tell you, Judge, the claim is not ripe yet. First of all, it doesn't apply to these three claims; and, secondly, the Court is very clear, once that taking happens, there's no going back, the constitutional provision kicks in to protect the landowner, separation of powers doesn't apply, and the Court can step in and order payment and compensation.

And, Your Honor, if you want to -- oh, I was just reminded of something, Your Honor. I entirely misspoke when I said the city said that the landowners can now build, in their letter, that's not what they said. They told the landowners, in their letter, after they lost all of these motions and they saw liability coming, the city sent the landowner a letter, and this is what they said: You can go reapply. They didn't say -- they didn't even say you can build. I totally misspoke. The letter says, Hey, start over. This Master Development Agreement process that we put you through hell for two and a half years, charged you an extra million dollars and then denied, start

over.

The Nevada Supreme Court and the United States Supreme Court don't require that. The United States Supreme Court says that would implicate an absolute harassment upon landowners, because all the city would have to say is every time just reapply, reapply, reapply, and no matter how many times they reapply, they just denied it.

Your Honor, one last case. The Government cited to you Boulder -- *Cinnamon Hills versus Boulder City*, and in that case the Government said, Hey, this shows that you don't have property rights in Nevada because the city has discretion. That *Boulder City versus Cinnamon Hills* case, Judge, in that case the Court found that there was not a denial of all economic viable use and that there wasn't a taking. I don't know if that was a concern, Judge. But in that *Cinnamon Hills* case, that's what the Court found. The Court did not find that there are no property rights in the State of Nevada.

Judge, here's where I'll conclude. We've provided you this, Judge, we've given you citations to United States of Nevada case law where the facts are much less egregious than the facts of this case, and the courts found it taking: *Sisolak*, *County of Clark versus Sue*; they stated the standards in *Sloat versus Turner and Schwartz*; they stated the standards in *State versus Eighth Judicial District*; the *Del Monte Dunes* case where the Court found a taking - significant cases where a

taking was found under facts much less egregious.

And this is where I think is critical for everything that's happened and everything that the Government has argued. The City's case, Your Honor, they have not cited to you even one case with taking facts like this where the Court did not find a taking. Not one. All they had to do, Judge, instead of all of this that they did was say, Judge, here's a case where the Court said here's the taking standard, the facts are like ours, and the Court did not find a taking. Not one case did they give you Your Honor, not one case.

Your Honor, if I could have just 30 seconds, I just want to make sure I didn't forget anything; is that okay?

**THE COURT:** Yes, you can, sir.

**MR. LEAVITT:** And I'll close this out right now.

(Pause in proceedings.)

**MR. LEAVITT:** I've been reminded of three things, Your Honor. First of all, the city's comments that they made, remember the City Attorneys' Office and everything that they've made, a lot of those were made in court proceedings and therefore the doctrine of judicial estoppel would apply also to prohibit the city from changing its position here.

And I've been reminded that that *Kelly* case that I discussed about segmentation, again, that was a *Penn Central* case where the *Penn Central* factors were applied under those contexts that segmentation they don't apply here in this case.

And, Your Honor, I'll close it out. You have our -- you have our list of what our claims are: The *per se* regulatory taking, the *per se* categorical taking, and the non-regulatory *de facto* taking. And, Your Honor, we believe that the facts in this case, when considered in the aggregate, meet each one of those standards.

And so where we are is we filed our motion, I've made my argument, the city did its opposition to those three claims, we've argued our reply to those three claims, and we'd ask that the Court enter a ruling on those three claims at this time.

**THE COURT:** I understand, sir.

I have one last question for you. What about the second claim for relief? They filed a motion for summary judgment, that's my recollection.

**MR. LEAVITT:** Yes. I'll be brief on it.

The second claim for relief, in response to the city's motion for summary judgment, is a *Penn Central* taking claim. We did not move for summary judgment on that, the city did. We would submit to the Court that the facts of this case meet the *Penn Central* standard also because the *Penn Central* standard considers, number one, the economic impact to the landowner. Clearly, we've gone through that; number two, the second factor that's considered is the interference with investment-backed expectations. Clearly, there's been interference with investment-backed expectations. We went through the due

diligence, and the city confirming that the property had the right to be developed, and the landowner allocated a hundred million dollars towards the property and the city prohibited the development. The final element of a *Penn Central* claim is the character of the government action.

And, Your Honor, we've seen the behind-the-scenes statements: "I want dirt on this guy, so I'm hiring a private investigator, I'm voting against the whole thing, we're allocating $15 million for this property." And, Judge, there were some emails that were so full of expletives that we didn't even include them in what we've cited up here.

The character of the government action towards this landowner has been abstruse and in bad faith, Your Honor, so we believe that all three elements of the *Penn Central* claim have also been met. But the reason we did not move for that is because if the Court finds a taking under any one of these three, then *Penn Central* doesn't even apply.

In fact, the Court said in *Sisolak*, *Penn Central* doesn't even apply under a *per se* regulatory taking; you don't even need to apply it. Under a *per se* categorical, you clearly don't need to apply a *Penn Central* analysis either; and under a non-regulatory *de facto* taking, the court said you don't need to apply a *Penn Central* analysis because the standards are different, and the Court knows that.

All right. Your Honor, anything else from me?

**THE COURT:** No, sir.

**MR. LEAVITT:** All right. Your Honor, so we would again move for summary judgment on those three claims. Thank you.

**THE COURT:** All right. And we'll take a 15-minute recess. It's five minutes to 11:00, and we'll let the city have its final word at 11:15, how's that?

**MR. LEAVITT:** All right. Thank you, Your Honor.

(Recess taken at 10:55 a.m.)

(Proceedings resumed at 11:13 a.m.)

**THE COURT:** All right. And we can hear the rebuttal from the city.

**MR. SCHWARTZ:** Thank you, Your Honor.

Your Honor, there can't be a taking in this case because the entire badlands was designated PROS in the General Plan, and that did not allow residential development. That's the law.

The developer argues that there's no case where the Court didn't find a taking on these facts. Well, that's not correct. The *State* -- and these are all in our exhibits, tabs 12 through 14 and beyond: The *State* case, the *Kelly* case, the *Boulder City* case, and dozens of federal cases that we've cited in our papers, some of which we've set forth in our exhibits, like dozens of federal cases such as *Lingle* and *Williamson County* on which the Nevada Supreme Court cases, *State, Kelly*

and *Boulder City* are based - all deny takings claims, and the developer completely ignores these cases.

*State*, *Kelly* and *Boulder City* say that a taking involving denial of use, involving a permit application, denial of a permit application requires a denial of all economically beneficial use of the property, so basically a wipeout. They all say that. That's the law in this state. These were not PJR cases. The *Boulder City* and the Ninth Circuit case that we cite between the same parties on the same facts saying there's no property -- no constitutional property right conferred by zoning was not a PJR case. If the zoning conferred constitutional rights on the property owner, then none of these cases would exist. There would be no need for a permit.

And, again, all property zoned, and so if you don't -- if you have a constitutional right to build whatever is a permitted use in that zone, you don't need a permit, there's no discretion on the part of the agency, and of course that's completely wrong. So we wouldn't have any of these cases, we wouldn't have any of these state statutes saying that the city has discretion when it comes to approval of a permit regardless of the zoning, and this Court has made that finding as a matter of law.

If the zoning conferred property rights, then *Stratosphere* in the entire body of case law would not exist. There would be no need for a permit. The agency would have no

discretion, and *Stratosphere* says, in Las Vegas, the city has discretion as to whether to approve the site development permit, and that includes a test discretion to approve a general plan amendment as well, and so it has discretion to lift the PROS designation or not; and if it has that discretion, it's completely incompatible with the constitutional right to build whatever they want as long as it's allowed by zoning.

If zoning conferred a constitutional property right on every owner of property in the State of Nevada, then the agency that adopted the zoning ordinance would have to compensate all those property owners every time it changed the zoning and took away any of those alleged rights, and of course that's absurd, and so is the theory that there is a constitutional right to build.

But I think what really puts this into focus is if zoning conferred a constitutional property right and, according to the developer's distinction between PJR cases and other cases, then if the City Council denies a permit application and the developer then sues with a PJR, the City Council had discretion. But if the City Council denies a permit application and then the owner sues for a regulatory taking, it had no discretion. That's obviously an absurdity and that is not the case here.

Now, the law isn't what city staff told the developer.

The test for a taking is not whether the city has, quote, targeted the developer or told the developer this or that or made the developer do this or that or made the developer expend money. None of that is relevant. 98 percent of counsel's argument for the developer is about matters that are completely irrelevant to whether there was a taking here. The taking test is clear - wipeout or near wipeout or interference with investment-backed expectations.

Why is the developer not moving for summary judgment on the *Penn Central* claim? That's odd. Because it's easier to show a *Penn Central* claim than their wipeout, complete wipeout thing, because in *Penn Central* you only needed near wipeout; where as with their first cause of action they label categorical taking, you need a wipeout. Well, it's because the developer is stuck with the fact that the property was designated PROS when it bought the property, and so its investment backed-expectations, which is a factor under *Penn Central*, come into play. It had no expectation that it could build residential on the property because of that designation.

And so that highlights -- the reason they're avoiding the *Penn Central* claim, even though it's easier to prove than their categorical claim, is because they don't want to have to face that fact. Also, it shows that the price they paid for the property, which is 4 and a half million, again, there is absolutely no evidence that the developer paid more than 4 and

a half million for the property. The City moved to compel the developer's documents on this issue. The developer finally produced the documents, and the developer admitted they have no documents whatsoever, not a shred, not a shred of evidence or document other than the developer's own claim that they paid more than 4 and a half million for the property. Remember the purchase and sale agreement was 7 and a half million, and the city has established that through the documents produced by the developer that they paid only 4 and a half million, and 3 million was in consideration for other property. The seller confirmed that in the seller's deposition.

But be that as it may, 4 and a half million is a golf course price. It's $18,000 an acre. Where is the developer? This appraisal they've got, their own initial disclosure say that if they could develop the property for residential, it would be worth $1.5 million per acre. Well, they paid $18,000 per acre instead of $1.5 million per acre for the badlands. That shows the developer knew that they couldn't develop residential on the property unless the city lifted the PROS designation.

(Inaudible objection made by Mr. Leavitt.)

So the fence is irrelevant, access is irrelevant, and it has nothing to do with the denial of all use of the property --

**THE COURT:** Sir, I don't want to -- I want you to keep

going, but there's apparently a lodged objection. You don't have the benefit of being here live, but if you could just pause for one second.

Mr. Leavitt, what's your objection, sir?

**MR. LEAVITT:** My objection is just the purchase price is set forth in a motion *in limine*, and we strongly disagree with that. But the second is the city under doctrine of judicial estoppel has submitted a pleading stating the developer's purchase price is not material to the city's liability for regulatory taking. They submitted a pleading where they said it's not even material, and counsel spent a lot of time on the purchase price. It wasn't material in any other case for liability, and the city brought in a pleading the purchase price is irrelevant when determining liability.

And, for the record, that pleading was filed on September 15th, 2021; it stated City's Response to Developer's Sur-Reply entitled Notice of Status of Related Cases.

**MR. SCHWARTZ:** Your Honor, the purchase price is not relevant to the takings claims, because no matter what the developer paid - and Judge Herndon also made this finding - even if they paid $45 million or a hundred million, as they say, by the city approving 435 acres -- 435 units in the 17-acre property, the city increased the value of the badlands, according to the developer's own evidence, by $26 million.

So it doesn't matter whether they paid 4 and a half

million or $45 million or a hundred million to show a taking. All that matters is the city didn't wipe out the value of the property. The city did the opposite. It approved 435 housing units in the parcel as a whole. That's a lot of units. There's no way that the developer can argue that it wiped out the value of the parcel as a whole when the City approved 435 units.

There's no dispute -- now, this appraisal that the developer has submitted, Your Honor, the city doesn't need to have an expert to rebut that appraisal. That appraisal is a sham. Here's why. The appraiser is required to determine what the highest and best use of the property is. The highest and best use is a use that's physically feasible and legally feasible.

The developer instructed the appraiser to disregard the PROS designation that provides that you can't use the 35-acre property for residential; it's against the law. So the appraiser likely disregarded the law, the legal use of the property, and found that the property could be used for residential, and then if it was valued -- if it could be used for residential, then it would be valued at $35 million. The fact is that -- and that it's worth zero if it could not be used for residential.

So what their appraiser is saying is that at the time the developer bought the property, the property was worth zero.

**MR. LEAVITT:** I just have an objection, Your Honor.

**MR. SCHWARTZ:** Worth zero because the PROS designation said you can't use it for residential. The developer -- the appraiser said you can't use the property for residential, and it's worth zero.

So there's been no taking. The City hasn't decreased the value of the property, it hasn't wiped out the value, because, according to the developer's own allegations and its own expert, the property was worth zero when it bought it. So we don't need an appraiser to say what the law is, the law is the law.

But the developer makes many, many strawman arguments, Your Honor. One is that that there was a condition of approval of the PRMP, Peccole Ranch Master Plan, that required the badlands to remain in open space in perpetuity. No, there was no such condition. The condition of approval was that the badlands be set aside as open space. That was both required for the gaming district and by the approval of the RPD-7 zoning for that 614-acre portion OF THE PRMP. That was required to be set aside for open space. The City could change that.

The city then later designated, in 1992, designated the badlands as PROS in the General Plan. The City can change that. There's no condition that the property has to remain in open space forever, and it's not a taking for the city to require the developer to set aside property when the city is approving a comprehensive plan, a master plan.

Now, in our Exhibits I through P, which is tab 18, Your Honor, we have shown the Court all of the ordinances that designate the badlands PROS. This is the law, it's not a guideline, these are ordinances, and that the General Plan is the highest law in planning in the city.

I would like to refer the Court to the end of tab 18, which is Exhibit P. It's from Exhibit P of the city's exhibits, and on page 0317, which is just before Exhibit Q -- so the pages are numbered on the bottom right, and this is page 317. It's a map, a general plan map of the southwest sector of the city. It's the last page before Exhibit Q, and it starts at page about 318. So this was the General Plan that was adopted by an ordinance with "P" in 2011, and this was the General Plan Map in effect when the developer bought the property. This map shows the 35-acre property as well as the entire badlands as PROS in the General Plan, and PROS is for -- allows for open space, recreation, parks, et cetera. It does not allow residential use. So this was the law in effect when the developer bought the property.

Now, at tab 38, at page 14, this Court said, in denying the PJR: For the purpose of promoting health, safety, morals or the general welfare of the community, governing bodies of cities are authorized with power to regulate and restrict the improvement of land and to control the location and soundness of structures, the city's discretion is broad.

Now, this is true whether the developer later sues for a PJR or a regulatory taking. The Court said the city did not have to require -- well, so the city didn't have to require dedication of property to the public, it didn't have to require dedication of the property to the city to take title. It didn't have to require CC&Rs to designate the land in the General Plan as PROS.

We've given the Court five examples of cases where the property was zoned RPD, but was -- but the open space portion of the area was designated PROS in the General Plan. Whether those properties also had CC&Rs or not is irrelevant. The City has the power to require the developer, as a condition of approval of a planned development, to set aside property for open space.

In fact, in Nevada Revised Statutes 278.250, the city -- the state legislature directs the city to, quote, "promote the conservation of open space," end quote.

In the City's Ordinance UDC 19.16.050, and this is at tab 27, that's the RPD-7 zoning. It says, RPD-7 zoning is to provide, quote, "enhanced residential amenities and efficient utilization of open space," end quote. That's what the city did here, that's what it's required to do for planned developments by the state and by its own ordinance.

And so open space -- again, in the Court's order, in which the developer prepared this order for the Court in its property rights motion, the Court said that single-family and

multi-family residential use are --

**THE COURT:** Sir, I have a question for you. You keep going back to the Master Plan, but what's the application of NRS 278.349, and that would be 2 -- I'm sorry, 3E, specifically dealing with conformity with zoning ordinances and master plans. What's the impact of that? What's the impact of that statute?

**MR. SCHWARTZ:** Your Honor, that is not controlling here, and the Court so found --

**THE COURT:** But wait a second. No, no, no, don't tell me. I want to know about this case, this claim for relief, because you're making statements and I want to know what the application of the statute is. If there's a discrepancy between the Master Plan and the ordinance, what does the Nevada legislature mandate takes precedence?

**MR. SCHWARTZ:** Okay. 278.349 was adopted in 1977. It said --

**THE COURT:** I don't want to know the history, I just want to know what's --

**MR. SCHWARTZ:** That's what I'm explaining, Your Honor, if you could allow me to explain. It was adopted in 1977. It said that, in considering -- in considering a tentative map, the Court shall, or the agency shall consider, and it said in subsection E that the consistency with the master plan, and if they're inconsistent then the zoning will prevail.

All right. In the *Nova Horizon* case in 1989, the *Nova Horizon* case, Nevada Supreme Court said, Well, consistency with the General Plan is -- there's a presumption that zoning has to be consistent with the General Plan, ignoring 349 because that only applied to tentative maps. So the Court said in *Nova Horizon* there's a general presumption that zoning has to be consistent with the General Plan, and that was based on the language of NRS 278.250 at the time. Now, that's the statute, and that's at -- that's at tab 21 and that's at the time: Zoning shall be consistent with the General Plan.

So then you have the Supreme Court saying, Well, that's a presumption and there may be cases in which it doesn't have to be consistent.

Then in 1991, the legislature, in reaction to *Nova Horizon*, said it doubled down on its expectation that zoning always has to be consistent with the General Plan, that zoning is subordinate to the General Plan. It changed the word "shall" to "must." The legislature said, Zoning *must* be consistent with the General Plan, and that's the wording that you'll find in tab 27, excuse me tab 21, in Nevada Revised Statute 278.250. It "must."

So not only was 278.349 not mandatory, it said that the agency shall consider, and it only applied to tentative maps. But the legislature changed the law to make sure that it always, in every case it complies, and you can't have a

situation where in most applications if there is a tentative map it's combined with a site development permit in Las Vegas, rezonings, other permit applications - all of those have to be consistent with the General Plan. So even if the tentative map doesn't have to be consistent, as part of that development for all practical purposes it must be consistent.

And now -- and this Court has so found in its decision denying the PJR, the Court made a ruling of law, and this applies to PJRs or regulatory takings in any cases. Tab 38 own page 20, paragraph 49, this Court said, "The Court rejects the developer's contention that NRS 278.3493(e) abolishes the council's discretion to deny land use applications."

First, NRS 278.3493 merely provides that the governing body shall consider a list of factors when deciding whether to approve a tentative map. Subsection E, upon which the developer relies, however, is only one factor. In addition, NRS 278.349(e) --

**THE COURT:** You can always exercise discretion. At the end of the day, it really comes down to one fact: Did they exercise their discretion and it results in a taking. That's the difference here, right? And if it deprives the landowner of all economic benefit, then that's a problem, right?

Because, I mean, I'm looking at it from this perspective. I recognize the discretion of the City Council. I'm not going to throw the City Council under the bus in

exercising discretion when they make decisions, and the decisions they make are based on politics, I get that, right?

But then when that interferes with the bundle of rights that landowners have, that's a different animal. That's why, put it this way, if this was the end of all end, a PJR, then whatever determination is made in the PJR would impact this case. We know that doesn't happen that way. In fact, the Nevada Supreme Court tried to remind me of that. I didn't need to be reminded of that, and I don't mind saying that, it's so simple. There are different burdens, different standards completely.

In many respects when it comes to petitions for judicial reviews, for the most part my hands are tied. I can't sit back and substitute my judgment for the City Council or for the Worker's Compensation Board, or anyone, I can't do that, right? If there's something in there to support their decision, I basically got to rubber stamp it. That's basically what it comes down to. It's a pretty high standard to overturn their decision making.

This is a different forum. We're in full-blown civil procedure. The question is this, whether the plaintiff has met their burden of proof. That's really and truly what it comes down to, and those are the factors I'm going to consider.

I'm not worried about any points and authorities that are being referred to as far as the petition for judicial review

is concerned. I just want to tell you, I'm looking -- and I think I've made that pretty clear in the past as far as that matter is concerned.

Because it's my recollection we had very, very rigorous discussion on this exact issue when Mr. Ogilvie was here, who is a very competent lawyer, I will admit. He's really good, but I disagree, and that's what it comes down to. And I feel pretty confident that the Nevada Supreme Court will agree with me on that issue, I don't mind telling you that.

But, sir, I don't want to cut you off. I want you to continue on with your discussion and make your record.

**MR. SCHWARTZ:** Your Honor, I think it's important to be clear about what the plaintiff's claims are. The plaintiff has a claim -- has put forward a claim that the zoning of the badlands confers a constitutional right to build whatever they want as long as it's a permitted use. Okay. That's not a test for a taking. A test for a taking -- I mean, this is a taking case. That's not a test for a regulation of use taking.

Putting aside *Sisolak* and all those physical takings claims, which the developer has completely blurred the sharp distinction between those two cases. For their first and second causes of action alleging that the city has denied the owner's use of the property and taken the property, they're claiming that they have a constitutional right to use that property for whatever they want as long as it's permitted by

the zoning.

Now, that's not the test for a taking, a taking for some right to develop. The test for a taking is a wipeout or a near wipeout or interference with investment-backed expectations. Whether the city has taken some right or not, even if they existed, isn't a taking.

The developer has spent 95 percent of their argument rearguing the PJR. That claim that they have a right to develop, if they had a right to develop, then the Court would have granted the PJR and we wouldn't be here. That's a PJR claim, and that's -- 95 percent of their argument, their authorities, their evidence goes to the PJR. It's important to draw that distinction. So the city is responding to that claim, that the city -- that they didn't have such a constitutional right, and that law is substantive law. There is no substantive PJR law. The Court has already found they didn't have that right. It doesn't matter whether it's a PJR or a regulatory taking. They don't have a right, a constitutional right conferred by zoning, period. That's the Nevada Law of Property and Land Use.

**THE COURT:** If that were the case -- I have a question for you. If that were the case then, we wouldn't have the *Penn Central* cases, would we?

**MR. SCHWARTZ:** Of course we would, yes.

**THE COURT:** That's my question. I was listening to

what you were saying, because in *Penn Central* you have to exhaust your administrative remedies -- is that correct? -- under *Penn Central*.

**MR. SCHWARTZ:** No, no.

**THE COURT:** Didn't you say that or --

**MR. SCHWARTZ:** No, no, that's the developer's characterization. I said you have to obtain a final decision. There's a big difference, insofar as --

**THE COURT:** Wait. Wait. But I thought in *Penn Central*, like weren't they talking about exhaustion of administrative remedies?

**MR. SCHWARTZ:** No.

**THE COURT:** I mean, isn't that what they -- strike that. I'll take that back.

Isn't that what they were talking about in *Sisolak*, right? In fact, isn't that what Justice Maupen even referred to in the dissent in the case? He said he disagreed, he felt that *Sisolak* should have been a *Penn Central* analysis.

But my point is this, and I understand futility, I understand *Penn Central*, but it seems to me that hypothetically one of the threshold questions when it comes to takings, if I'm following a *Penn Central* type case, and it goes to the issue of ripeness, that if you don't exhaust your administrative remedies, the case is not ripe to be determined under *Penn Central*, I kind of get that. But on the flipside of that, if

that's the case then, why isn't it if you exhaust your administrative remedies, that's not the final conclusion of the case? And that's my point.

**MR. SCHWARTZ:** Your Honor, I disagree with the premise, and I disagree with the conclusion.

**THE COURT:** Tell me why then. That's why I'm asking the question.

**MR. SCHWARTZ:** I intend to do that.

The ripeness doctrine is not exhaustion of administrative remedies. The ripeness doctrine requires a final decision. That means that you need two applications, at least two applications to be denied for the property at issue. You don't have to appeal to an appellate body, you don't have to file a PJR, you have to obtain two decisions denying application so that the Court can say, you know, there's a final decision here. They're not going to allow you to develop anything on the property. That hasn't occurred in this case.

The *Sisolak* case is a physical takings case, Your Honor. We've been going through this entire hearing with the developer, you know, willy-nilly citing *Sisolak* for all these rules that don't apply to the first two causes of action, because they concern regulation of the owner's use of the property. *Sisolak* is a physical takings case. I could quote the Court. The Court says ten times this is a physical --

**THE COURT:** Well, I've got a question for you. Why

isn't this -- here's my question: When the city enacted the ordinance in this case, wasn't that a physical taking?

**MR. SCHWARTZ:** Your Honor, a physical taking is --

**THE COURT:** The question is, and you can go ahead and answer it -- go ahead.

**MR. SCHWARTZ:** It's clear that a physical taking requires an ordinance that allows the public or the Government to physically invade the property, to walk on the property.

**THE COURT:** What about the public walking on the 35 acres here, wasn't that part of the statute or the ordinance?

**MR. SCHWARTZ:** No, Your Honor. If I could back up and address why *Sisolak* doesn't apply to the ripeness doctrine before we get to the physical taking claim. The Court asked why doesn't -- why did the Court say in *Sisolak* or the dissent say in *Sisolak* that the ripeness doctrine doesn't apply? That's because in a physical takings claim, the taking occurs when the Government exacts an easement to allow either the Government or the public to physically invade the property.

That's what happened in *Sisolak* and in *Nick* and in *Cedar Point*. The courts were quite clear that the ordinance, the statute in those cases exacted an easement of physical interest in property. It has nothing to do, nothing to do with regulation of the owner's use of the property, and there are different rules that apply. Of course the city has never argued

that the ripeness doctrine applies to a physical takings case, which is the developer's third cause of action. It only applies to cases where you have to apply for a permit and it's alleged that the Government denies use of the property.

And nor has the city ever argued that the ripeness document applies to non-regulatory taking claim. Of course it doesn't apply. If there's no regulation, there's no permit application, then you don't need a final decision. The decision in a physical takings case is made when the ordinance is adopted that exacts the easement.

So the *Sisolak* court never said that the ripeness doctrine does not apply to a claim regarding the owner's use, denial of the owner's use. In fact, it said the opposite. It said it does apply, but it said it does not apply in this case, which is a physical takings case. It doesn't logically apply, because you're not applying for a permit; you're not regulating the owner's use of the property.

The *Sisolak* court did not say that the owner has a constitutional right conferred by zoning to use their property. The Court said that in the context of the owner's damages, you determine damages based on the owner's -- based on zoning and other factors. Yeah, you have to consider zoning because that limits the use of the property.

So it said that the owner had a right to use the air space because it owned the property, it owned the fee simple

interest in the property. It didn't say it had the right to use the property because the property was zoned for some use. Zoning is irrelevant when you have a physical taking. The property could be zoned for a casino or for open space, for whatever. It doesn't matter. It's irrelevant. In a physical takings case, if you require the owner to allow others on the property, it's a taking. It has nothing to do with the first and second causes of action.

While I'm on that, and I do want to address the Court's -- the developer's physical taking claim and why the Bill 2018-24 did not exact an easement from the property owner, but if I could first address a point that I think is germane to the Court's question.

The developer claims that the *Bustos* case, the *Andrews* case, the *Buckwalter* case, the *Alper* case all say that the developer has a constitutional right conferred by zoning to build whatever they want, and that's false. That is dead wrong. Those cases, except for *Alper*, are eminent domain cases. In eminent domain, the city, the condemning agency concedes liability. The only issue in an eminent domain case is the value of the property.

Therefore, and so those cases cannot possibly set a standard for liability for a regulatory takings case, because it's not at issue in those cases, and they don't say that. None of them say anything about zoning conferring rights.

What they do say is basically the opposite, that in an eminent domain case, an appraiser who is valuing a property and determining the highest and best use, must consider the existing zoning of the property, that the appraiser can't assume that the property would be zoned for a higher or more profitable use unless it's reasonably probable that the agency would change the zoning.

So what the Court is saying is you're limited, the zoning limits the use. You can't assume a use that's excluded by the zoning. So it's really saying the opposite of what the developer is saying. The zoning doesn't confer rights, it limits your rights.

Now, one of those cases, the *Alper* case, is an inverse case, but *Alper* only deals again with value, and it says, in *Alper*, the Court found liability for an inverse condemnation, liability. So the issue in *Alper* was what's the value of the property? And the Court said, Well, we apply the same rules in inverse cases as we do in eminent domain cases. But what the Court meant was the same rules for value, not liability, because liability is not at issue, it's not an issue in an eminent domain case.

The Court made -- no eminent domain case makes any pronouncements about liability for regulatory takings. That's a wipeout or a near wipeout or interference with investment-backed expectations. By regulation, it has nothing to do with an

eminent domain case. So the Court in *Alper* said, We apply the same rules for the date of value as we do in eminent domain cases, and that's fine. That's all about value, and that's right.

When you're valuing a property -- if the Court were to find liability here, it couldn't apply those eminent domain cases to determine liability. It has to apply *State* and *Boulder City* and *Kelly* and *Lingle* and the other regulatory cases that set the standard.

But if the Court finds liability and we go to the valuation phase of the case, Well, then yeah, the eminent domain cases are going to be relevant because they set the rules for how you determine value in an eminent -- in a regulatory taking case. Totally irrelevant.

And the developer's theory, if somebody confers rights, is based on these -- this misinterpretation of all these cases. There is no case that says that zoning confers constitutional rights to build. All the cases say the opposite. All of the eminent domain cases that the developer sites basically say the opposite. The Supreme Court in the 17-acre case and the order of reversal said that you -- that the city properly required a General Plan Amendment, and that's completely inconsistent with the theory that you have constitutional rights in zoning.

*Stratosphere* and all the other cases, including

*Boulder City*, that was not a PJR case, are quite clear zoning doesn't confer any constitutional rights at all, doesn't require you to a building permit.

In fact, if I could, Your Honor, I'd like to address the physical takings claim because -- and, again, the Court should draw a clear, sharp distinction between physical takings and regulation of use takings. It shouldn't be applying physical taking rules to regulation of use. That's not proper.

The claim is that Bill 2018-24 exacted an easement in favor of the public on the developer's property, and that's false.

**THE COURT:** And tell me why it is. Because I'm looking at this bill, I have it right in front of me, and for the record, this would be ordinance 6650, and it appears to me it deals specifically and is interesting, the timing of this order, I don't mind saying that. And you look at the sponsor, it was Councilman Seroka. And I understand what it is attempting to do; it's dealing with repurposing of open spaces and golf courses, I see that.

But it appears to me, when I read this, ultimately there's a requirement to provide documentation regarding ongoing public access, and you're dealing specifically with private property. How is that any different than the air space in the *Sisolak* case? Because there, it appears to me if you're asking to provide documentation regarding ongoing public access, how

can they do that to private property?

**MR. SCHWARTZ:** Your Honor, this ordinance is completely different than the ordinance in *Sisolak*. *Sisolak*, the decision is quite clear that the ordinance in *Sisolak* exacted an easement for airplanes for the public to invade -- physically invade the property owner's air space at the time the ordinance was passed that exacted an easement. This ordinance does nothing of the sort.

First, the ordinance only applies to proposals for redevelopment of golf courses, only proposals. The ordinance was only in effect for 15 months, from November of 2018 through January of 2020. During that period, the developer -- none of the developer's proposals were in effect. They had all either been denied or voided by the Crockett order. So there were no -- so it only applied to proposals. It didn't apply, like *Sisolak*, it didn't apply to all property in the zone. Once that ordinance was adopted in the *Sisolak* case, all property in this particular zone, it exacted an easement from all properties in that zone.

This ordinance only applies to proposals, and there were no proposals. It was conditioned, it wasn't absolute, and it only applied to proposals. No proposals in effect while that ordinance was in effect.

**THE COURT:** Don't you think that -- don't you think that would have a chilling effect on proposals?

**MR. SCHWARTZ:** Your Honor, that's not the test for a physical taking.

**THE COURT:** No, but, I mean --

**MR. SCHWARTZ:** Timing is irrelevant. None of that is relevant to a physical taking, it has to exact an easement.

The ordinance imposed no substantive requirements, only application procedures. And Judge Herndon, Judge Herndon rejected this argument that --

**THE COURT:** Sir, you've got to listen to me. I don't care what other judges do, I don't.

**MR. SCHWARTZ:** The ordinance required a maintenance plan --

**THE COURT:** And I like Judge Herndon.

**MR. SCHWARTZ:** -- and the maintenance plan had to document a number of things, including ongoing public access.

The ordinance is absolutely clear, Your Honor, if the city does not -- did not notify an owner that they had to prepare the maintenance plan, then the owner did not have to document ongoing public access. And the evidence is undisputed that the city never required the owner of the badlands to submit a maintenance plan, so the ordinance did not apply to the badlands.

Furthermore, the ordinance applied -- only required the owner to, quote, document public access. There was no requirement to allow it.

So when the developer shut down the golf course in 2016, by 2018 there was no ongoing public access to maintain, even if it did apply. Even if the city had given notice and the developer had to submit the plan and the developer had to document whether there was ongoing public access, there was no ongoing public access to maintain, and so it couldn't apply to this developer. It couldn't apply and didn't apply.

**THE COURT:** When did they apply for the fencing?

**MR. SCHWARTZ:** Pardon me?

**THE COURT:** When did they apply for the fencing?

**MR. SCHWARTZ:** 2017.

**THE COURT:** And this ordinance -- would this ordinance have been in place during that time period?

**MR. SCHWARTZ:** No. But that -- the fencing is irrelevant, Your Honor. To have a physical taking denying -- even if the city had denied the fencing, and it didn't, the developer didn't file the proper application, and this is not the proper proceeding for the Court to second guess the city's staff persons --

**THE COURT:** I'm not second guessing the city's decision. I'm just assessing the impact of the city's decision. There's a big difference there.

**MR. SCHWARTZ:** Well, the only impact that's relevant in this case, Your Honor, is whether the city exacted an easement from the property owner. That's the only legal issue

that's relevant. All of the other evidence that the developer submitted, again, is a -- it's a retrial of the PJR, that the city somehow targeted the developer or had bad reasons for doing what it did.

Your Honor, takings doesn't consider means or ends, it doesn't consider whether the city's actions were wise or not or unwise, whether they were reasonable or unreasonable --

**THE COURT:** I agree. I'm not arguing. You're not listening to me. I'm not sitting here to assess the city from a political perspective as to why they made their decisions. I'm not here for that, I'm not. Ultimately, it comes down to what is the impact of the city's decisions, that's all I'm doing.

So I want to make sure the record is clear that I'm not sitting here questioning why, for example -- well, no, whether it was prudent or not for the city to make decisions in this case, right? I'm not here for that. I'm just addressing what is the impact of the decisions made by the City Council. Nothing more, nothing less.

I understand there was heated political issues here. And I will say this, that when you run for City Council, it's a political job. You all get it. You have constituents in your district, or whatever, and it is what it is. I mean, I respect that. They have to make decisions, they vote, but at the end of the day if their decision-making process results in the taking

of real property, or allegations of a taking, then I have to assess what the impact is. Nothing more, nothing less.

**MR. SCHWARTZ:** Well, yeah, but there was no taking.

**THE COURT:** Well, no, I understand that's your position, I do, I get that. I'm listening to that part.

What I'm trying to say is I'm not -- I'm not saying whether the City Council -- I'm not assessing the politics behind their decision. That's probably the best way to say that, because I know it's --

**MR. SCHWARTZ:** Your Honor, the developer argued that this ordinance, this ordinance 2018-24 was somehow retroactive, and required the developer to allow people on its property because it was retroactive. Well, that's wrong too.

The ordinance expressly states it only applies to proposals, and there were no proposals in effect when this ordinance was -- no proposals for redevelopment of the badlands when this ordinance was in effect, so it couldn't be retroactive if it simply didn't apply on its face.

The language --

**THE COURT:** Do we have any evidence as to why there was a sunset provision contained in the ordinance?

**MR. SCHWARTZ:** No, it was not in the ordinance. The City Council repealed it, Your Honor.

**THE COURT:** Okay.

**MR. SCHWARTZ:** And with regard to this retroactivity,

Nevada law is clear, statutes are otherwise presumed to operate prospectively unless they're so strong, clear and imperative that they have no other meaning or unless the intent of the legislature cannot be otherwise satisfied, and that's the *Segovia versus Eighth Judicial District* case, 133 Nevada 910, at page 915. That's a 2017 case.

So the statements of city staff that this bill is retroactive are irrelevant. The City Council decides whether an ordinance is to be retroactive, and here it adopted an ordinance that was clearly not retroactive.

So that's the developer's physical takings claim, and it's nothing like *Sisolak* or *Nick* or *Cedar Point*.

Now, Council Member Seroka telling neighbors -- the allegation is he told the neighbors you own the badlands, you can walk on it. Well, you know, this Court said in its decision denying the PJR that the statements of these individual city council members are irrelevant, that the action is -- the Court has to review actions of the governing body of the City Council. The statements of an individual City Council member have no impact, no legal impact on the property that could be deemed a taking. It has to be -- the Court can only look at decisions by a majority vote of the governing body. So that means yes, the Court can look at this ordinance 2018-24, but, you know, that might be relevant, and, yes, worth the Court's review, but not individual City Council members making

statements. I mean, they could say you own this Walgreen's over here. Is that speaking for the city, so they untrespass on the Walgreen's? Well, no, that's not relevant to the Court's inquiry here.

I want to address --

**THE COURT:** What about this, this is a different issue. What about the statements made by Seroka and the fact that he was the sponsor of the bill at issue, and do they come in as it pertains to intent --

**MR. SCHWARTZ:** No.

**THE COURT:** -- you know, the reason behind the bill. And tell me why not.

**MR. SCHWARTZ:** Because the statements of an individual legislator are irrelevant and, in fact, can't be considered in determining the intent of the legislation. It has to be -- that intent has to be determined based on what the legislation says. And the reason for that is a legislator who is opposed to the measure could say, Oh, this is what the bill means, as a way to say -- as a way to get in the record an improper intent in the legislation.

So the Court has to look to the legislation on its face. If the legislation is clear, then the Court doesn't conduct a further inquiry.

But just because Council Member Seroka said that this legislation means one thing or the City staff says it means one

thing is irrelevant.

But, Your Honor, I'm just reciting to the Court rules of legislative intent. They're completely irrelevant here. What Council Member Seroka said about the legislation and the intent of the legislation and Council Member Seroka's intent are completely irrelevant in a takings case.

**THE COURT:** And this is why I'm asking you the question, because I do understand statutory construction and interpretation, and unless there's an ambiguity in a general sense, you don't look to the legislative history, I get that, but this is a very, very unique scenario.

So what do I look at to make a determination, if it's required, as to bad faith and/or targeting a specific property owner as the plaintiff suggests? Or I don't look to that at all?

**MR. SCHWARTZ:** Your Honor, that's a very good question, and it goes to the theoretical basis for regulatory takings.

Here's what happened. 1922, Mayhan said functional equivalent of an eminent domain is a taking.

In the 1980s and 1990s and up to 2005, the United States Supreme Court and the lower courts were struggling with this issue. The issue was, well, is bad faith whether the law is a good law or a bad law, whether it's effective or not, is that relevant to the takings analysis?

And in 2005, the Supreme Court really tied a lot of the loose ends in takings cases together. And the Court said the wisdom or lack of wisdom, the efficacy or inefficacy of legislation, the intent of legislation, whether it's bad faith or good faith - all completely irrelevant, completely irrelevant. Those go to a -- those are a due process claim, or in this case go to a PJR. That's a PJR issue. The Court said completely irrelevant to takings. Takings assumes -- takings assumes that the legislation -- the regulation is valid. It assumes that the regulation is valid, but it has gone too far and wiped out the value.

So 95 percent of counsel's argument is that the City was in bad faith, that it abused this developer who did bad things to the developer to disparage the developer, that the timing shows that the city was out to get the developer and target the developer. 95 percent of what counsel has argued is completely irrelevant in a takings case.

And the *State* case relies heavily on the *Lingle* case. This is a Nevada Supreme Court state case, 2013 I think, relies on *Lingle*. Nevada is in lockstep with the United States Supreme Court on takings, except for physical takings where the Nevada Supreme Court has a broader view of physical takings than taking of regulation of use. In regulation of use they are exactly the same, and whether the regulation is intended to do something to the developer is completely irrelevant. The Court only looks at

the economic impact of the regulation on the property, and that has to be -- that is necessary. That test makes sense.

When I opened this argument I said, you know, the law is supposed to make sense. Well, if the Nevada legislature and the legislators of each state give local agencies discretion to regulate land use for the community, again, not for individual property owners but for the community, which Nevada does, it grants broad discretion, and this Court has so found, then you can't consider -- you can't have a takings doctrine that requires compensation if the landowner claims, well, you targeted me or you were out to get me. You can only look at the economic impact of the regulation on the property, otherwise you're interfering with the discretion that's granted to public agencies. As this Court said, that discretion is quite broad, and it's to protect the community, the general health, safety, and welfare.

So that's the reason why the Supreme Court said, you know, if we're going to make this takings doctrine logically, legally consistent, if we're going to make the theory of takings consistent, is that when a regulation goes too far and it wipes out value, well, that's like a taking in the Constitution.

Remember, the taking originally only meant eminent domain where the public agency takes the entire interest in the property, takes the entire interest in the property, takes the fee simple interest. If the taking were anything less, for

example, if the taking were because the Government passed a bad law, a law that wasn't going to work or that was unfair, if it were anything other than that, not only would it interfere with this broad discretion of public agencies who regulated land use, but it wouldn't be tied to the Constitution because it wouldn't be a taking, it wouldn't be the functional equivalent of eminent domain. So that's why the *Lingle* court made it very clear that none of this evidence that the developer submitted is relevant.

And this also goes to this issue of PROS, what the developer is arguing in this case. If the Court finds that the PROS designation is valid, and this Court has already found that, and that's a fact, it's a mixed question of fact and law. But the Court has already found that the PROS designation is valid and applies and that the developer has to obtain an amendment of that to develop the property for residential, the Court has already made that finding. That is completely inconsistent with a taking in this case. It's completely inconsistent with the fact that the City has no discretion and therefore the developer has constitutional rights to develop, and it's completely inconsistent with a ripe act, because that PROS applied to the property at the time the developer bought the property, and so this can't possibly be a taking, because the City didn't change the law. The law was in effect and the developer paid whatever price the developer paid. Whatever the price the developer paid, the City didn't change the value

because the PROS designation is valid.

And what *Lingle* said is takings assumes that the regulation is valid. If you're going to challenge the regulation as invalid, that's a due process claim, it's not a takings claim.

So in this case the developer challenges the validity of the PROS designation. That's not a takings claim. So we wouldn't be here if that could be a taking, because it challenged the validity.

Now, not only did the Court find that that PROS designation is valid and is superior to the zoning, but the PROS designation was imposed in 1992. There is a 25-day statute of limitations for the developer to challenge that ordinance. It was reapplied -- reaffirmed, confirmed. And all of the ordinances from Exhibit I through P that are in tab 18, including the page 317, which was from the 2011 ordinance, which was in effect when the developer bought the property, there's a 25-day statute of limitations to challenge all those designations.

The developer's argument that the property was never properly designated PROS and they didn't get notice, we submitted evidence that they did get -- that the City complied with every procedural requirement for that ordinance, but we didn't have to because the statute of limitations has run. The developer can't flip the burden for the city to prove that the

city complied with all of the regulations, applicable regulations to adopt that. The burden is on the developer to come in to court with a PJR in 25 days after that's adopted to establish that that ordinance is invalid. It's too late for all of the ordinances Exhibits I through P that we've submitted to the Court, including Exhibit -- through Q, including Exhibit P, which was in effect when the developer bought the property.

So this case is really quite simple, Your Honor. The Court has already found that the PROS designation is valid and prevails over zoning, that the developer had to lift that in order to develop property. They bought the property with a PROS designation in effect, and there can't be a taking. There can't be a taking by regulation, and there can't be a physical taking because the City didn't exact an easement.

Now, the developer also has submitted a non-regulatory taking claim. And I refer the Court to the title of that claim, "non-regulatory." Okay. The developer says that the City can be liable for a taking if it interferes with the property in some way, like denies a fence or access, and of course the City never denied access, it just denied additional access. So it's nowhere near like the *Schwartz* case or these other cases the developer cites.

**THE COURT:** What's the difference between denying -- if you deny additional access, that's a taking.

**MR. SCHWARTZ:** No, it's not.

**THE COURT:** Well, I'm telling you, I'm ruling it's a taking if you deny it.

**MR. SCHWARTZ:** There's no case that says that.

**THE COURT:** Well, but I've never heard anybody make that argument before. If you're saying that -- I mean, I'm listening to you, and I just -- it seems -- because I want to make sure you said -- what did you say again, that they deny -- it seems to me if you deny additional access, why wouldn't that be a taking?

**MR. SCHWARTZ:** Because you haven't wiped out the value of the property. They already had access. Not only did the City not deny access, it only required that they -- it said you have to file this application. They didn't file the application. They didn't challenge the City decision, as they should have, could have if they wanted to come into this Court and say that that was wrong. But even so, denial of additional access when they already had access is not a taking, it's not a wipeout. It's pretty simple.

So for their non-regulatory taking claim, they say that --

**THE COURT:** Here's my next question. What about the issue regarding property value? We talk about, you know, a reduction in the value of the property, et cetera, et cetera. What evidence do we have from a property evaluation that's been submitted by the City?

**MR. SCHWARTZ:** Well, we have -- well, we don't need a valuation to show that the City has not wiped out the value, because the City didn't just maintain the status quo, it didn't change any law.

In the *Lucas* case, *Lucas* is the classic takings case. You buy property, there's no restriction on residential use, the Government says no, now you can't -- it's a single-family lot, now you can't use it for residential. There's really no other use, so that could be a wipeout taking. It actually wasn't in *Lucas*, but it could be. That's not this case. That's the classic case.

This is a case where we have a plan development set aside of the open space as required by local and state law, and the City designates it PROS. It's designated PROS when the developer buys the property. The City said, Okay, well, we're not going to change the law, you've got what you bought.

So we don't have to submit evidence of what the property was worth when the developer bought it or what the property would be worth if the developer could develop it for residential. We don't have to -- the City doesn't have to prove that to show there's no taking, because the City didn't change the law. The PROS designation is valid. The developer still has exactly what it bought. So whatever the value was, the City didn't change, it didn't wipe out the value.

If, as the developer claims, the property was worth

zero when it bought the property because the property owner contends that if the PROS designation is valid, the property is worth zero, well, this Court has already found that the PROS designation is valid and applied, and so that means, okay, the property, take the developer at their word, the property is worth zero. The City didn't change the law. It didn't wipe out the value. It didn't change the value at all. The developer has not been injured. The value of the property hasn't changed, so we didn't have to submit any value to establish no taking in this case.

But, you know, we do use the developer's own evidence that the value of the badlands increased by at least $26 million when the City approved 435 units. We're using the developer's own evidence of value. Take the developer's appraisal. Okay. Instead of under the developer's initial disclosures where they say that the badlands is worth $1.5 million per acre, their appraisal that they got later says it's worth a million per acre. Okay. Great. If you say it's worth a million per acre, if you can develop it for residential, but when you bought it you can't develop it for residential, what good is the city appraisal going to be that says, Oh, well, if you could develop it for residential, it's not 35 million, it's 45 million or 50 million or 12 million? It doesn't matter. It's because the City didn't change the value of the property. In fact, it enhanced the value of the

property. The developer got a permit to build 435 units today and it still has 233 acres left that it can apply for development for or use for open space, buffer or golf course or other uses.

I'd like to address the non-regulatory claim if I could. That's the developer's fourth claim.

In saying that, well, the City can be liable for a taking and have to pay compensation if it interferes with the use of the property, that's not what the state court said. The developer failed to mention that the state court said that it has to render the property unusable or valueless. Unusable or valueless. It's basically the same test as a regulatory wipeout. This is just non-regulatory wipeout of some actions.

And the typical -- and the state court said, well, it indicated -- because it relied on two cases for what constitutes a non-regulatory taking, and those were physical takings cases not like *Sisolak*, not a regulatory physical taking case where the government adopts a legislation exacting an easement, but a physical taking case where maybe the government takes the property, or some city improvement, some government improvement physically damages the property owner's property, so that's a non-regulatory taking.

The other case that the state court indicated could be a non-regulatory taking is where there's an official announcement of an intent to condemn or a condemnation, and

while the property is under the threat of condemnation, the agency interferes with the property, and I refer to the *Richmond Elks Hall* case where the agency indicated it was going to condemn the property. I think it adopted a resolution of necessity: We're going to condemn this property. But they failed to proceed with the condemnation, and during that time it flooded the property and it, I assume, rendered the property unusable or valueless.

We don't have that case here. We don't have a case where there's a public improvement that fails that physically damaged the property. This is just a regulatory takings case. And there was never any announcement, official announcement of an intent to condemn that would trigger the other type of non-regulatory damages case. And the developer argues, Well, there's some note that's probably from Councilmember Seroka: Does the City have enough money to acquire the property? That's not an official announcement of an intent to condemn, which requires a vote of the City Council. So that doesn't count, that one council member considered proposing to condemn the property. That's doesn't count.

But then it gets even more difficult for the developer, because not only do they not allege any kind of physical damage to the property for improvement or other physical taking or that the city made an official announcement of intent to condemn the property, the evidence that they put

forward for their amendment is regulation of use, of excessive regulation of use. They just refer back to the evidence that they claim supports an excessive regulation of the owner's use of the property. That's a regulatory taking. So their non-regulatory taking is completely without merit.

Your Honor, I think -- I request that the Court review its decision denying the petition for judicial review.

**THE COURT:** I'm not going to review that. I'll address that right now, and I'll be really clear on that. I think I've been clear on that issue in the past. I mean, for example, you have a work comp claim, and it might have been the example I used before, and I thought about this, and I'm called upon as a judge to review a hearing master's decision in a workers' compensation claim where he makes a determination as to no injury due to the event. All I do under those circumstances is determine whether there's substantial evidence in the record to support his decision, his or her decision. Nothing more, nothing less. And if it is, and assuming there was no violation of the law, I go ahead and will affirm that decision.

Notwithstanding that, if there's a third-party claim in front of me where the driver of the automobile was involved in an accident that caused the injury, the findings don't come in in the independent tort case. I thought I was pretty clear on that. They don't, right? There's no preclusive effect. And

that's what we have here at the end of the day.

So I want to make sure it's clear, because there's different standards, different burden of proofs, my hands are tied as far as reviewing the City Council. They are, right? I can't -- I'm just telling you, I'm not going to do that.

**MR. SCHWARTZ:** Your Honor, you made findings of fact in your decision that those facts don't change whether you--

**THE COURT:** Those findings of fact were based -- wait a second, let me finish. Those findings of facts were based upon a different form of proof. It's a different case, right?

I'm just -- this is going to be my ruling. That's not going to be disturbed. It's a different burden. It's a different review, it just is.

**MR. SCHWARTZ:** All right. Your Honor, for the record, the finding of law, mixed fact and law that there is a PROS, that there are ordinances that adopt a PROS designation, and that that PROS designation is valid, that's a mixed question of fact and law and that's true whether the proceeding is a PJR or a regulatory taking claim. That doesn't change.

It's like saying, okay, you know, cows don't fly, and then saying, well, if the developer then sues for a regulatory taking that cows can fly, it's the same law, it's the same fact, it's the substantive law of the state, and they apply in a regulatory takings case, and the Court has already made that finding.

**THE COURT:** I have not made that finding.

**MR. LEAVITT:** You're correct, Your Honor, and I'm going to object.

**THE COURT:** Don't tell me I made that finding when --

**MR. LEAVITT:** Your Honor, this is about the 15th time counsel has argued this, and it's becoming oppressive and harassing, and we want counsel to move on and end this discussion.

**THE COURT:** I mean, I thought, you know what, I'll say this again for the record. Mr. Ogilvie can be very convincing. He did a very good job in presenting his argument on that issue, and I think I made a decision on that, right?

**MR. LEAVITT:** Correct.

**THE COURT:** I made a decision on that, and I think my decision was right in light of a recent decision the Nevada Supreme Court gave me where they didn't even make that decision yet, right? They were clear that there's different standards applicable. I get that, you know.

And for the record, I don't mind saying it, I mean, Mr. Ogilvie was very convincing. It was discussed vigorously, right?

**MR. LEAVITT:** Correct, Your Honor.

**THE COURT:** And you know --

**MR. SCHWARTZ:** Your Honor, I have one final point.

**THE COURT:** Go ahead.

**MR. SCHWARTZ:** One final point. The *Kelly* case, the developer argued that the *Kelly* case, in applying the segmentation rule, the *Kelly* case facts are virtually identical to this case. The distinction that counsel made was also wrong and not a distinction.

The *Kelly* case applies to parcel as a whole rule, and the facts are identical. The *Kelly* case did not hold that the segmentation rule only applies in the *Penn Central* case. That would be illogical. That would be absurd.

There's no difference in segmenting -- there's no difference in the analysis if you segment the property whether the segmented property was nearly wiped out versus all -- wiped out, nearly wiped out, wiped out, makes no difference for purposes of segmentation. The point of segmentation is that you can't focus on only a part of the property and conclude, well, the regulation has wiped out all value of that property, when it's part of a larger parcel of the whole parcel, and the City has not wiped out the value of the whole parcel.

So the *Kelly* case is directly on point, directly on point, and we think mandates a summary judgment for the City on the first two causes of action, as I've indicated for the categorical taking and the *Penn Central* taking.

The third cause of action is for a physical taking. The only evidence the developers put forward is this Bill 2018-24, and we've shown why that did not exact an easement

from the City, it didn't apply, and even if it did, it didn't require that the developer allow the public onto property.

And their non-regulatory taking claim, there's no evidence to support it, so we would request that the Court deny the developer's motion for summary judgment and grant the City's motion for summary judgment. Thank you.

**THE COURT:** All right. Is there anything else?

**MR. LEAVITT:** Nothing from the plaintiff, Your Honor.

**THE COURT:** All right. Sir, did you want to add anything?

**MR. MOLINA:** No, thank you, Your Honor.

**THE COURT:** Okay. I just wanted to make sure. You've been sitting there very patient.

Anyway, it's my understanding we've heard all evidence; is that correct?

**MR. LEAVITT:** That's correct, on behalf of the plaintiff, Your Honor.

**THE COURT:** And all evidence on behalf of defendant?

**MR. SCHWARTZ:** Yes.

**THE COURT:** This is what I'm going to do. There's -- we have a very rigorous and well-developed record in this case, and I'm going to make some decisions right now.

I'm going to ask a rhetorical question for everyone. Regarding the plaintiff's motion for summary judgment or summary adjudication of the *per se* regulatory taking, first claim for

relief, I'm going to grant that, for the record.

As it pertains to the *per se* categorical taking, third claim for relief based upon the current record we have, I'm going to grant that also.

Same thing for the fourth claim for relief, I'm going to grant that one too.

We've heard a lot of evidence in this case, and I think under the facts and circumstances it's pretty clear that we had a taking, and that's going to be my decision.

On that issue, Mr. Leavitt, I'm going to have you prepare findings of facts and conclusions of law on that issue and go into detail. You can rely upon the record, and some of the issues that have been raised during this very vigorous discussion and argument. Make sure you circulate it. If you have competing -- if the city doesn't agree, then the city can of course submit their proposed findings of facts and conclusions of law.

And I don't mind you putting in that, sir, because we've had a rigorous discussion as to the impact of the petition for judicial review, and I think I've been pretty clear as far as my view of the law in that regard, it's a completely different standard, I'm handcuffed. All I have to do is make sure that the decision is not clearly erroneous and/or there's substantial evidence in the record or there's no plain error as a matter of law. That's it. That's all I can do. This is a

much different forum, a much different scenario.

My final question is this. It comes down to the second claim for relief as it pertains to *Penn Central*, and it's the city's position that summary judgment should be granted on that issue as far as -- I mean, what does the plaintiff want to do with that claim now, sir?

**MR. LEAVITT:** Your Honor, once you found the taking under -- and Mr. Schwartz conceded this, once you found a taking under a *per se* categorical taking, that's a higher threshold than a *Penn Central* taking, so you wouldn't need to even enter findings on a *Penn Central* taking claim, because you've already entered the findings on the *per se* categorical taking claim.

Now, if the Court wanted us to provide an analysis on that, we could provide an analysis and say that those three standards have been met also.

**THE COURT:** Okay. I want to hear from the city on that, because I don't know.

**MR. SCHWARTZ:** Well, if the Court finds that there's a categorical taking, then I, you know, I'm not sure what the basis of the Court's ruling is, but it might apply the same to the *Penn Central* claim. If the Court finds that the city has met a test for a regulatory wipeout, then you certainly meet the test for economic impact for *Penn Central*.

Why don't you -- I propose we have the plaintiff put

in the order whatever they want. If they think that --

**THE COURT:** I just want to --

**MR. SCHWARTZ:** If they think that *Penn Central* claim, that they should get judgment on their *Penn Central* claim, they didn't move for it, but, you know, I think they should be required to say what effect the Court's ruling has on the *Penn Central* claim.

Probably, you know, if they moved on it, if the Court found that there's been a wipeout, then the Court probably would have granted summary judgment on the *Penn Central* claim, too, because it's a lower showing.

**THE COURT:** That's why I asked the question.

**MR. LEAVITT:** It would be -- in other words, in short it would be met also, Your Honor.

**THE COURT:** Okay. That will be part of my decision, too.

And prepare rigorous findings of facts -- I know you will, but it's important. Make sure it gets circulated.

**MR. LEAVITT:** I will, Your Honor.

**THE COURT:** And so I guess we're next up on that, looking at the dates, you're coming back -- okay, so we have a status check and trial readiness in two days, so we'll talk about other issues then.

**MR. LEAVITT:** Sounds good, Your Honor.

**THE COURT:** All right. So anyway, everybody enjoy

your afternoon.

**MR. LEAVITT:** You too, Your Honor. Thank you, and stay safe.

**MR. MOLINA:** Thank you, Your Honor.

**THE COURT:** Thank you, sir.

(Proceedings adjourned at 12:39 p.m.)

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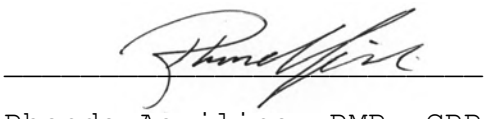
Reporter's Certificate

State of Nevada )
)
County of Clark )

I, Rhonda Aquilina, Certified Shorthand Reporter, do hereby certify that I took down in stenotype all of the proceedings had in the before-entitled matter at the time and place indicated, and that thereafter said stenotype notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record to the best of my ability of the proceedings had.

In witness whereof, I have hereunto subscribed my name in my office in the County of Clark, State of Nevada.

Dated: October 3, 2021



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CLARK COUNTY, NEVADA
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| 180 LAND COMPANY, LCC,<br><br>Plaintiff,<br><br>vs.<br><br>LAS VEGAS, CITY OF,<br><br>Defendant. | ) | CASE NO. A-17-758528-J<br><br>DEPT. NO. XVI<br><br>**Transcript of Proceedings** |

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

TUESDAY, OCTOBER 26, 2021

**ALL PENDING MOTIONS**

APPEARANCES:

| | |
|---|---|
| FOR 180 LAND COMPANY, LLC: | JAMES J. LEAVITT, ESQ.<br>ELIZABETH GHANEM HAM, ESQ.<br>AUTUMN L. WATERS, ESQ. |
| FOR CITY OF LAS VEGAS:<br>(Appearing via BlueJeans Video conference) | GEORGE F. OGILVIE, III, ESQ.<br>ANDREW W. SCHWARTZ, ESQ.<br>CHRISTOPHER J. MOLINA, ESQ.<br>REBECCA L. WOLFSON, ESQ. |

RECORDED BY: MARIA GARABAY, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

**LAS VEGAS, NEVADA, TUESDAY, OCTOBER 26, 2021, 9:35 A.M.**

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THE COURT: ...the next matter and that would be page 12 of the calendar and it happens to be 180 Land Company, LLC versus the City of Las Vegas. And let's go ahead and get set up.

MS. GHANEM HAM: Good morning, Your Honor. Elizabeth Ghanem Ham on behalf of plaintiff 180 Land.

THE COURT: So we have -- here's the issue. We have the defense on BlueJeans, we have the plaintiff in the courtroom. I just want to make sure I understand how everyone feels about that.

MR. OGILVIE: Your Honor, this is George Ogilvie. My office contacted your chambers this morning to ask which courtroom this was being heard in this morning because the Court has made remarks that it won't be conducting the trial which starts tomorrow in this courtroom. So I wanted to make sure I was going to the correct courtroom and my secretary was advised that this would be a BlueJeans only hearing.

THE MARSHAL: That is correct, Your Honor.

THE COURT: Yeah.

MS. GHANEM HAM: And, Your Honor, I apologize. My office did call on either Wednesday or Thursday and asked if you were taking in live hearings and we were told we could come in person, so that's why we're here.

THE COURT: And I don't mind saying that I think what happened when you made the call last week, Lynn Berkheimer, my Judicial Executive Assistant, was not working. She was on a vacation. She was somewhere in the mountains of Utah driving her 4x4 and having a lot of fun. That's what she was doing, you know.

So anyway, I guess we can handle this a couple ways. Number one, Mr. Ogilvie, do you have an objection?

MR. OGILVIE: I'm thinking, Your Honor.

THE COURT: And that's okay. And tell me this. Where are you located? Are you out in Summerlin or are you downtown?

MR. OGILVIE: I'm -- I'm neither.

THE COURT: Okay. Because if you want to come down and you want to appear, we can break and I'm going to make sure you have -- I'm going to accommodate you, sir, if that's what you want to do.

MR. OGILVIE: I understand that. I understand that and appreciate it, Your Honor. As I say, I'm thinking. I think unfortunate miscommunication; however, I think we will just proceed as is.

THE COURT: Okay. Well, I can say this for the record. I can hear you very clearly. I can. I can hear you and see you very clearly. No problem there. Okay, we'll go ahead and get set up in the courtroom and I'll give you a

chance to get set up. And, Mr. Ogilvie, if there's something you want to look at, we'll make sure we accommodate you, sir. We will.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: All right. I'll step down for a few moments. Let me know when you're ready.

THE MARSHAL: All rise. Court will be in recess for five minutes.

THE COURT: Yeah.

(Court recessed from 9:39 a.m. until 9:49 a.m.)

THE COURT: All right. And for the record, the next matter we're calling is 180 Land Company, LLC versus the City of Las Vegas. And let's go ahead and set forth our appearances for the record.

MR. LEAVITT: Your Honor, good morning. James J. Leavitt on behalf of the plaintiff landowner, 180 Land.

MS. WATERS: And I'm Autumn Waters, also on behalf of the plaintiff landowners, Your Honor.

MS. GHANEM HAM: Good morning, Your Honor. Elizabeth Ghanem Ham, also on behalf of plaintiff landowners.

THE COURT: All right.

MR. SCHWARTZ: Andrew Schwartz for the City, Your Honor.

THE COURT: Yes. Good morning, sir. And let's go ahead from the defense perspective. I think Mr. Schwartz set

forth his appearance.

MR. SCHWARTZ: Yes. Andrew Schwartz.

THE COURT: Yes.

MR. SCHWARTZ: Good morning, Your Honor. Andrew Schwartz for the City.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the City of Las Vegas.

THE COURT: All right. And from the City's perspective, are there any more appearances that need to be set forth on the record?

MR. OGILVIE: I believe Rebecca Wolfson and Chris Molina are also participating this morning, Your Honor.

THE COURT: All right.

MR. OGILVIE: On behalf of the City.

THE COURT: Okay. I just wanted to make sure we didn't overlook their appearances. Okay. And so --

MR. OGILVIE: Your Honor.

THE COURT: Yes, sir?

MR. OGILVIE: Your Honor, this is George Ogilvie. I appreciate the Court's offer of an accommodation. If I could, though, ask Mr. Leavitt if he intends to provide the Court with exhibits, because we've argued enough cases against each other, I see that Mr. Leavitt typically provides the Court, whether it be this Court or other departments, with spiral-bound binders of exhibits. If he could contact his office and

have them forward those exhibits to me?

THE COURT: Mr. Leavitt?

MR. LEAVITT: I won't be doing that. I'll be referring to statutes and I might give the Court a copy of a statute. But other than that, no, I won't be presenting exhibits, Your Honor.

THE COURT: And so for the record, did you hear that, Mr. Ogilvie?

MR. OGILVIE: I did, Your Honor. Thank you. That's satisfactory.

THE COURT: Okay. All right. Okay, so I'm looking here, we have a few matters on calendar and I'm wondering, should we just proceed in case order or are there some issues we can resolve summarily before we get started?

MR. LEAVITT: Your Honor, James J. Leavitt on behalf of the plaintiff landowner. I think what might be the best thing to do is to address the summary judgment motion first. And the reason I say that is because part of that bleeds over into some of the other motions, also.

THE COURT: All right.

MR. LEAVITT: I know that's the most difficult one, but I think it's appropriate. And that will be -- it will take the longest to argue, but it will help resolve some of the other issues as well.

THE COURT: Okay. Did you hear that for the record,

Mr. Ogilvie?

MR. OGILVIE: Yes, we did.

THE COURT: And what's your impression of that? Should we handle that first or do we have an agreement?

MR. OGILVIE: I'll defer to the Court, Your Honor.

THE COURT: Okay. If there's no opposition to it, we'll go ahead and deal with that motion first. And as to my understanding, that's Plaintiff's Motion for Summary Judgment on Just Compensation. Is that correct?

MR. LEAVITT: That's correct, Your Honor.

THE COURT: Okay. You have the floor, sir.

MR. LEAVITT: Thank you, Your Honor.

Your Honor, the reason I said that the summary judgment motion should perhaps go first is because the landowners filed a motion for partial summary judgment, of course, on the just compensation issue, maintaining that there's only one appraisal report that's been submitted in this case and that's the appraisal report by Mr. Tio DiFederico, an MAI appraiser who has 36 years appraising property in the city of Las Vegas. And he went through all of the mandatory appraisal requirements and he arrived at a value of $34,135,000 for the taking of the property. And that's where we are in this case, Judge. We are at one issue in front of the jury. What's the value of the property as of December -- I'm sorry, as of September 14th, 2017.

THE COURT: You know, I have a question for you on that.

MR. LEAVITT: Sure.

THE COURT: And it's a real simple question.

MR. LEAVITT: Sure.

THE COURT: Is this motion in the proper posture procedurally that I can make that type of determination?

MR. LEAVITT: Yes, Your Honor. And the reason I say that is because the City itself has also counter-moved for summary judgment. And so the City has said, listen, we don't have any factual disputes, it's a legal question. Does the Court need to adopt the landowner's appraised value of $34,135,000, or does the Court need to adopt the City's position that the value of the property is zero?

THE COURT: But here's my question.

MR. LEAVITT: Yes.

THE COURT: At the end of the day, ultimately wouldn't a jury make that decision?

MR. LEAVITT: Yes. And here's where -- absolutely, Your Honor, in every single one of these cases that's how we do it, but in every single one of these cases the government shows up with an appraisal report. That's what's different in this case. And so --

THE COURT: I mean, I get that. But you have to remember, my question I think was really pretty specific as to

whether or not this case is in the proper procedural posture for me to render that type of decision.

MR. LEAVITT: And the reason I say that, yes, it is, Your Honor, is because -- well, let me take a step back. This Court -- in every inverse condemnation case there's three issues. The first issue is what is the property rights that the landowner had. This Court decided that issue was a matter of law. The second issue is whether there's been a taking of that property right. And this Court entered a decision as a matter of law that the property has been taken.

So now the sole issue that's being presented to the jury is what is the just compensation that must be paid for the taking of that property. And so this issue is teed up specifically for the jury to decide. However, if there's no factual dispute at this time, Your Honor, then this Court could make that determination of what the just compensation is.

But if I may, Your Honor, the critical point here is did the City have a mandatory duty to prepare an appraisal report and bring that appraisal report to the Court and to the jury? That's what really the real relevant question is before the Court, is does the City have a duty in every eminent domain case to prepare an appraisal report and present that appraisal report to the jury? And if the City doesn't meet that duty, what are the -- what's the remedy if the City does

not bring an appraisal report to this Court or to the jury? That's really what the question is.

And, Your Honor, Nevada has adopted two mandatory laws that state that the City of Las Vegas is required in this type of case to prepare an appraisal report and the City is prohibited from paying less than that appraisal report. It has a mandatory duty to take those actions. And, Your Honor, that comes right out of the Sisolak case. If we turn to the Sisolak --

THE COURT: And I don't mind, I'm just going to tell everybody -- I always tell everybody what I'm thinking; right? I just do.

MR. LEAVITT: Sure.

THE COURT: And when I look at this, this is my issue. Not issue, this is an observation. And I was just wondering from a procedural perspective, does the motion meet the requirements of Rule 56? It's really simple to me. It was -- jumped off the pages and so on, because I understand the underlying law behind it. I understand your position. You said, look, Judge, we have an expert. They don't have an expert. The sole issue to be determined by the jury would be value. I get that, and so on and so on.

But I sit back -- and this is something I always think about and I don't mind telling you this, especially when it comes to motions for summary judgment, typically when I see

a motion for summary judgment it's based upon a declaration and/or affidavit and/or testimony. Sometimes we have answers to interrogatories or requests for admissions that potentially could be the basis for that. And when I looked at it, it didn't seem that this case was at that evidentiary posture for me to make that determination.

MR. LEAVITT: Understood, Your Honor. If I -- and I want to address that issue, Your Honor.

THE COURT: Yeah. I mean, to me that's really -- that's like the elephant in the room --

MR. LEAVITT: Uh-huh.

THE COURT: -- when I looked at this because I said, you know -- I mean, I filed many a motion for summary judgment from a defense perspective and also from the plaintiff's perspective, but it was always based upon deposition testimony and/or discovery responses.

MR. LEAVITT: Right.

THE COURT: Sometimes you would have a declaration or affidavit, depending on the type of case it was. Sometimes you would have a declaration or affidavit, depending on the type of case it was. Sometimes -- and that was early on in my career when I was doing med-mal defense work. Sometimes, you know, we have an affidavit requirement and the like and so on.

I mean, but that's what I'm kind of looking at because to me -- I don't mind telling this. I don't know what

our Nevada Supreme Court would do with this, but I think they would kind of look at it in such a way where, okay, Judge, you're granting summary judgment based on what; right?

MR. LEAVITT: Understood. So what we submitted to the Court and what we attached to our motion, Your Honor, was the appraisal report that was completed during discovery which was prepared by the MAI appraiser. That means there's only been one appraisal report submitted in this case submitted by an MAI appaiser. But let me explain why that's important in this specific context, because eminent domain cases are under Chapter 37.

THE COURT: I'm not disagreeing. I'm looking at this through the lens of Rule 56.

MR. LEAVITT: I got it. And I understand what the question is, Your Honor. I understand.

THE COURT: I'm looking at it -- I mean, it's a real simple question. Through the lens of Rule 56 --

MR. LEAVITT: Right.

THE COURT: -- that's how I'm looking at it.

MR. LEAVITT: And, Your Honor, I understand what you're saying. You can either move through depositions, you can either move through discovery or you can move through affidavits. The evidence that we presented here was submitted during discovery. It is the appraisal report. And so that's the evidence that we're providing to the Court; nobody

disputes. Now, I could attach an affidavit and say here's the appraisal report, it was produced during discovery and we move for summary judgment based upon this appraisal report, but Your Honor --

THE COURT: Or you could actually incorporate that appraisal report into a declaration and/or affidavit that would have been produced during the course and scope of discovery and that potentially would meet the requirements of Rule 56. But my point is this -- and I'm looking at it. I don't -- do any -- is there any case law that stands for the proposition that a report in and of itself is sufficient from an evidentiary perspective to be the basis for a summary judgment motion?

MR. LEAVITT: And, Your Honor, my answer to that would be, yes, Your Honor, and let me explain why. And here's why, Your Honor. Nevada has adopted two specific rules, okay, and I want to start with this one. And this is where it meets that evidentiary standard that you're going at right now. The first rule that the Nevada Supreme Court adopted was in the Sisolak case, and in that case the Nevada Supreme Court stated that the provisions of the Federal Real Property Acquisition Act apply to all political subdivisions.

And, Your Honor, again to your question, your question is very pointed. I understand the question. So quoting the Nevada Supreme Court in the Sisolak case, they say

the provisions of that Federal Real Property Acquisition Act apply to all Nevada political subdivisions and agencies. That same -- what the Nevada Supreme Court cited to, Your Honor, was NRS 342.105. In NRS 342.105, the Nevada Legislature decided to apply these Federal Real Property Acquisition Acts to all political subdivisions in the state of Nevada. So what that means is that the City of Las Vegas is required in all of these eminent domain cases and inverse condemnation cases to follow that uniform Real Property Acquisition Act.

And, Your Honor, here was the policy for that act, is that in the 1960s and 1970s the government was taking property and they weren't paying the landowners what Congress thought was just compensation. And so what the legislature -- what Congress did and what the Nevada Legislature did is they said we're going to follow these federal rules. And these federal guidelines, Your Honor, are set forth in 42 U.S.C. 4651. And here's what's so critical about what we're here for today, is that federal law requires that in any of these eminent domain cases the government is required to hire an appraiser and the government is required to have that appraiser appraise the property, and that the government is prohibited from paying less than the value that appraiser comes up with.

That's 42 U.S.C. 4651, Section 3 and Section 4. Here's what Section 4 says. It says no owner shall be

required to surrender their property unless the government pays an amount not less than the agency's appraisal of the fair market value of the property. So what that says, Your Honor, is that the government cannot come into an eminent domain case without an appraisal report. It has to bring an appraisal report and it's prohibited from paying less than that appraisal report. So the government has not met that standard in this case.

THE COURT: Okay. So what is the impact, though, on that -- and there might be an evidentiary impact at the time of trial. I get that.

MR. LEAVITT: Yes.

THE COURT: But for the purposes of summary -- for summary judgment --

MR. LEAVITT: Right.

THE COURT: -- where the moving party bears the burden of proof, typically.

MR. LEAVITT: Right.

THE COURT: And you're asking me to evaluate or accept the -- I'm sorry, to accept the number by your appraiser. And my point is this. There's a report; right? And we don't have testimony, we don't have an affidavit and the like. And in a general sense, aren't reports hearsay?

MR. LEAVITT: Oh, I understand what you're saying, Your Honor. Yes, in and of themselves. However, Mr.

DiFederico attaches to his appraisal report a certification, which is the equivalent of a declaration. And attached to that appraisal report, Your Honor, and I can provide you a copy if you'd like --

THE COURT: We can pull it up.

MR. LEAVITT: Yeah. It's what exhibit?

MS. WATERS: Give him the Bates stamp number.

MR. LEAVITT: It's the Bates stamp number TDG Report104. So, I apologize, Your Honor, I was going down another path. I understand what you're saying, Your Honor.

THE COURT: Yeah. So it's the appraisal report of Tio DiFederico.

THE COURT: We're pulling it up. We'll print it out.

MR. LEAVITT: All right.

THE COURT: We'll look at it.

MR. LEAVITT: And again, it's the Bates stamp 000104 and 105. And so, Your Honor, as you have that before you, you can see the certification at the top. He certifies that the facts contained in the report are true and correct. And then he goes through the analysis that he's done, that he has no bias; that the compensation -- well, I'll let you read it, Your Honor.

THE COURT: Is there another page to this? Is there a signature?

THE CLERK: The second page.

MR. LEAVITT: Yeah, on page 105 is the signature.

THE COURT: I think we're missing a page or two. How many pages is the report? I'm looking here from a Bates stamp perspective, does it start at 104?

MR. LEAVITT: No. The report starts at --

THE COURT: No, no, I'm talking about the certification.

MR. LEAVITT: The certification starts at 104 and ends at 105.

THE COURT: Okay. All right, I see it.

MR. LEAVITT: Okay. And so, Your Honor, that was submitted with Mr. DiFederico's -- I don't know if the Court needs -- I'll let the Court look at that.

THE COURT: I mean -- no, I have it.

MR. LEAVITT: Okay.

THE COURT: I do have some thoughts on it, but I'm going to hear what Mr. Ogilvie has to say. But go ahead, sir.

MR. LEAVITT: Okay. So that's the certification, asserting that it's true and correct to the best of his knowledge. And it goes through and lays out that he's met every single one of the appraisal requirements. He states in there that he's the one who's personally done the work and certifies that it's all true and accurate.

Now, another issue is, Your Honor, we could have brought the deposition of Mr. DiFederico, but the City of Las

Vegas elected not to depose Mr. DiFederico. In fact, the City has not challenged one part of Mr. DiFederico's report. And to be clear, the City had every opportunity to do that. The City had an opportunity to exchange expert appraiser reports. And the City also had an opportunity to submit a review appraisal report of Mr. DiFederico's report, which is a specific process that's allowed under the appraisal guidelines, which would have been a rebuttal appraisal report to Mr. DiFederico's report.

So, Your Honor, we have the appraisal report that was done by Mr. DiFederico. We have that report which includes his declaration certifying that everything is true and correct and that he has been -- and that he is personally responsible for all of that information.

Your Honor, I want to go back now to this federal requirement under the Federal Real Property Acquisition Act that Nevada has adopted and imposed on the City of Las Vegas. That Act then defines what an appraisal report is, and it states that the appraisal must be a written statement by an independent and impartially prepared qualified appraiser, setting forth the opinion of value as of the relevant date of value. And so, Your Honor, we have one provision in the Nevada Revised Statutes that mandates that the City prepare an appraisal report and bring that appraisal report to the court, and that the City is prohibited from paying less than that

appraisal report.

And, Judge, I want to turn to a second section in the Nevada Revised Statutes. And you'll recall that we discussed this statute at the take hearing. It's NRS 37.039. This statute also specifically requires that the City of Las Vegas produce an appraisal report. Your Honor, as you'll remember, 37.039 says that if the government takes property for open space -- and, Your Honor, I can give you a copy of this if you want. It's that one that we looked at previously. Do you want me to --

THE COURT: No, I'm fine. I'm fine.

MR. LEAVITT: Okay. All right, that's okay. All right. So in NRS 37.039, the Nevada Legislature elected to meet and adopt a statute which specifically applies to this exact situation we're in today, that when the government takes property for open space, this is what the statute says. It says, "Notwithstanding any other provision of law." In other words, no matter what any other law says, when the government takes a parcel of property for open space, it must at a minimum -- and this is what it says, at a minimum provide an appraisal report and then it must provide to the landowner the value of that property as appraised by the agency's appraisal report.

Your Honor, these are mandatory provisions that the government must follow in order to come into an eminent domain

case. What the Nevada Legislature said was that the government is not permitted to even appear in an eminent domain case unless it brings an appraisal report. And the only appraisal report that we have in this case that's been prepared by an -- actually, the only appraisal report we have in this case that's prepared as of the September 14th, 2017 date of value is that of Mr. DiFederico. And the City has not challenged that report. It's the only one that appears in this case. They have not contested it. They have not said that the valuation was wrong.

In fact, Your Honor, for all intents and purposes they haven't deposed him, they haven't done a review report, they haven't provided a rebuttal report. For all intents and purposes they've conceded to this report, because if the government doesn't concede to this report, Your Honor, it jeopardizes federal funds. If the City doesn't have an appraisal report and agrees to pay at least that minimum amount of that appraisal report, the Federal Relocation Act would prohibit the City from receiving federal funds.

And so, Your Honor, our request -- well, let me go -- let me take just a couple more steps on this because -- and I want to talk about the policy for why the Nevada Supreme Court and why the Nevada Legislature have imposed these requirements on the City of Las Vegas. Well, the first reason is because we've adopted specific statutory provisions for how

property is valued. First, the property must be valued based upon its highest and best use. Secondly, once highest and best use is determined, the value must be -- the fair market value must be based upon the highest price. And then thirdly, all of those valuation -- all that valuation evidence must be determined as of the relevant date of value under NRS 37.120. And in this case, 37.120 says the date of value is September 14th, 2017, which is the date of service of summons.

So we have in the -- Your Honor, those are all constitutional provisions. In our Nevada Constitution it expressly states that these are the specific requirements that must be met and followed to value property in an eminent domain case. And if the appraisal report doesn't meet that standard or if a party doesn't bring evidence that meets that standard, the party is not permitted to show up at trial and argue for something different.

And the policy was laid out clearly in a case called Tacchino v. State. In that case the Nevada Supreme Court said that the word just in front of the word compensation was meant to intensify the meaning of that word compensation and conveys the idea that the compensation in these cases must be real, ample, full and substantial. And so the Nevada Supreme Court and the Nevada Legislature have adopted the provisions and adopted the laws, and it's actually set forth in the Constitution that the only way that real, ample, full and

substantial compensation can be met on the government's side is if the government brings in an appraisal report. And the rules expressly state that it cannot pay less than that.

So those are the two requirements for the government to show up in this case. Number one, it has to bring an appraisal report. And number two, it has to pay at least that value of that appraisal report.

And so, Your Honor, I do want to address where we are today just very quickly. As stated, the landowner strictly complied with this process. We've produced the appraisal report timely and turned it over. The government, however -- you'll recall, Your Honor, when we met, I believe it was in spring of this year, 2021, the City of Las Vegas actually got a continuance on the motion for summary judgment. You'll remember, Your Honor, you granted their 56(d) continuance. I remember you said, hey, this was the first time I've done this; I'm going to grant it. And we all remember what the City's underlying reason was for wanting that continuance. They said, listen, Judge, we have to go determine the economic impact of the property. That's why we continued this case, to allow the City to determine the economic impact.

And then we appeared on September 28th on the take hearing and this is what the Court asked the City: "What evidence do we have from a property evaluation that's been

submitted by the City?" Clearly, Your Honor, you were referring back to the underlying reason why you gave the City those five months to determine the economic impact. And this was the City's response: "We don't have to submit evidence of what the property was worth when the developer bought it, or what the property would be worth if developed or could be developed for residential."

The government could not be more wrong, Your Honor. The government is required under 37.039 to prepare an appraisal report and pay at least that value. The government is required under the Federal Real Property Acquisition Act to prepare an appraisal report and pay at least that value.

And so, Your Honor, it hasn't met that standard. Those are specific requirements that apply only to a government in an eminent domain case. And the obvious reason for that is to protect this landowner's just compensation. In other words, what the Legislature decided is it's not going to let the government come into these cases without an appraisal report, without valid evidence and just try and undercut all of the other valuation evidence. And Judge, that's what we're seeing here.

So on the City's countermotion for summary judgment, again, conceding that summary judgment is teed up and ready for the Court to decided, the City says, Wait a minute, the reason that we at the City should win summary judgment is

because there's a PR-OS on the property and the property is valueless. Judge, you already decided that issue as a matter of law and rejected it, so that's not a valid reason for the City to win summary judgment.

The second issue that the City argues in its brief is that there's been no taking. And the City says since there's been no taking, then just compensation can't be paid. Well, we just received the order yesterday that there's been a taking. Therefore, summary judgment can't be granted for the City on that issue.

And then the final issue that the City raises is the City says, listen, the landowners used the wrong date of value. Well, Your Honor, 37.120 is the statute which lays out the date of value and the landowner strictly complied with that. Therefore, that's not a reason to grant summary judgment for the City of Las Vegas.

And so, Your Honor, we submitted the evidence of an appraisal. We submitted the certification of the appraiser, declaring that everything in there is true and correct and that he personally did that work and provided it to the Court. There's no counter evidence to that that the City could present at a trial. Again, the only thing the City can bring is an appraisal report and must pay at least that value of that appraisal report.

So, Your Honor, we would request that the Court

grant summary judgment on that issue. And, Your Honor, if you have any other questions, I can answer them. But of course we would have attached the deposition of Mr. DiFederico, but the City didn't take it. There was no deposition done. So the best thing we had to certify the correctness of that report and to move it from hearsay was the declaration of Mr. DiFederico, which is attached to his report, Your Honor.

THE COURT: Okay, sir.

MR. LEAVITT: All right, Your Honor. Do you have any other questions for me, Judge?

THE COURT: No, not at this time, sir.

MR. LEAVITT: All right.

THE COURT: Okay. Mr. Ogilvie, sir.

MR. OGILVIE: Your Honor, Mr. Schwartz will be arguing.

THE COURT: Okay. All right.

MR. SCHWARTZ: Thank you, Your Honor.

Your Honor, the developer's motion for summary judgment should be denied. The argument is that the City had a mandatory duty to appraise the property and that's incorrect. All of the rules that counsel cited apply to an eminent domain case. This is not an eminent domain case. There are major differences between an eminent domain case and a regulatory takings case, which is an inverse condemnation case. All those rules that Mr. Leavitt cited apply to a case

where the government has affirmatively taken property by filing an eminent domain action. Those rules make a lot of sense in the context of eminent domain where it's incumbent on the government to appraise the property, offer the property owner the amount of the appraisal before the government goes to eminent domain.

But the burden is on the government in an eminent domain case where by filing the eminent domain action the government concedes liability. It takes the property at the time it files the eminent domain complaint. So of course the government should have to appraise the property because it's going to take the property and it should be required to follow certain rules to make sure it's fair to the property owner that if the government is going to take their property that they do an appraisal and that the appraisal follow certain rules. And the only issue in the case is what's the fair market value of the property on the date of value.

The date of value is the date of the taking, and in an eminent domain case the date of the taking is when the government files a complaint and a lis pendens or some document that is recorded in the chain of title that indicates the government is going to take the property. That's the taking. And those rules are all directed at that process.

This is a completely different process in this case. It is not an eminent domain case, it is an inverse

condemnation case where liability is the primary issue. If liability is established, then the court or a jury determines the damages. And the damages are not the fair market value of the property, as it is in an eminent domain case. The damages are the difference for the categorical and Penn Central claims which allege that the City has regulated the owner's use of the property to wipe out the value or nearly wipe out the value. So for those two claims the measure of damages is the value of the property before the taking, as opposed to the value of the property after the taking. That's a completely different measure of damages than in an eminent domain case.

So those rules logically do not apply in this case. The City doesn't need an appraisal to introduce evidence at the trial of the damage. The burden is on the property owner to prove that the value of the property immediately before the taking was wiped out, as compared to the value after the taking. The developer has submitted an appraisal in which the appraiser says that the value of the property immediately before the date of value -- and we want to address the date of value because the date of value in an eminent domain case does not apply in this case. But assuming that the date of value of September 14, 2017 is the date of value, the appraiser's opinion is that the property was worth $34,000,000 immediately before the date of value, based on the fact that the property owner had a right -- that the legal use of the property was

for residential; that the legally permissible use was for residential. And of course the appraiser is required to determine the highest and best use of the property, and to determine the highest and best use the appraiser has to make a judgment as to what use is physically feasible, economically feasible and legally permissible.

So the appraiser in this case concluded that residential use was legally permissible the day before the date of value. The appraiser then concludes that as of the date of value the City has taken the property and that -- and determined that residential use is not a legally permissible use.

So we don't need an appraisal to show that the developer has not been damaged in this case because immediately prior to September 14, 2017, residential use was not a legally permissible use. The City's general plan designated the property PR-OS, which means --

THE COURT: Well, I understand that. But for the purposes of this trial that ship has sailed. I just want to tell you that. That will be an appellate issue you have a right to raise on appeal. But I've already ruled on that issue. The jury is going to be instructed in accord with the rulings I've made in this case and I just want to make that very clear.

MR. SCHWARTZ: The Court said in paragraph 39 of

its findings of fact and conclusions of law, the Court rejects the City's defenses that a master plan/land use designation of PR-OS that affects this Court's property interest determination. So there is no authority cited for that proposition and it's --

THE COURT: It's like I said, sir, you're going to have to accept this fact. This is a fact as far as this case is concerned. I've made rulings. You have a right to appeal. I respect everyone's right to appeal. At the end of the day the evaluation in this case is going to be based on RPD7. That's what it's going to be. That's what the -- and if I'm wrong, the court of appeals and/or supreme court can say that. That's the law of the case. We're starting trial tomorrow. We're picking a jury tomorrow. I just want to tell you that. I'm not going to relitigate that issue. But go ahead.

MR. SCHWARTZ: Your Honor, can I request clarification?

THE COURT: I mean, no. Request clarification on what? I've issued an order; right? We have motions for that. I mean, if you want to seek relief pursuant to Rule 60 from one of my orders, that's okay, but it's not in front of me right now.

What we're going to do is this. We're going to deal with this specific motion. I look at this motion in a very straightforward manner. I understand what the position of the

landowner is. But I was concerned about the evidence in this case as it's currently postured for a motion for summary judgment. It's a procedural issue. And I'm waiting for your response to that.

MR. SCHWARTZ: Well, Your Honor, I don't know if the City has a position on whether this motion is procedurally improper, but we certainly --

THE COURT: I'm not talking about -- I'm not talking about the motion being procedurally improper. I'm talking about the status of the evidence because pursuant to Rule 56, if I'm going to grant summary judgment there has to be uncontroverted issues of fact. But it has to be based upon admissible evidence; right?

MR. SCHWARTZ: Yes.

THE COURT: And the question is whether this -- whether the report -- and I understand the report, I understand what the purposes of the report would have been pursuant to Rule 16.1, to place the other side on notice. And you have the opportunity to take their deposition or not, that's up to you. But my point is this. Is that enough to grant summary judgment? Simple question to me.

MR. SCHWARTZ: I -- no. First, we understand that the Court has I think found that the PR-OS designation is either invalid or inapplicable. We don't feel that that is clear.

THE COURT: How about irrelevant?

MR. SCHWARTZ: Or irrelevant. If the Court -- we do seek clarification as to exactly what the defect in the PR-OS designation is because it's a critical issue in this case. So if the Court --

THE COURT: I agree. But understand, sometimes you get the decision you want, sometimes you don't. When you don't, you appeal. At the end of the day -- because I'm not changing this. This is going to be the law of the case moving forward. If there's something brought to the attention of the jury that's not in line with my ruling, there can be sanctions. I don't mind telling you that, you know. But my point is this. That ship has sailed; right? I'm looking at it from this perspective because whatever decision I make regarding the summary judgment motion, here's my concern, whether it withstands scrutiny of an appellate court. I don't mind telling you that. It's really that simple.

And so the master plan, all that stuff, we're beyond that now. We're dealing with one issue and one issue only, and that's valuation. That's what we're going to trial for. We're not relitigating issues. And the jury is not getting jury instructions on those types of determinations I've made as a matter of law. I just want to be clear on that, because this is this case. We're going to trial tomorrow. I'm bringing in a jury tomorrow. We're going to start voir dire

tomorrow and we're going to get this case done next week.

MR. SCHWARTZ: Your Honor, I just want to make the City's position clear. We understand I think from the Court's ruling yesterday and from your comments this morning that the City is not to mention the PR-OS designation at the trial. The City will abide by --

THE COURT: How is it relevant in light of my decisions; right?

MR. SCHWARTZ: Pardon me?

THE COURT: But go ahead. Go ahead, sir. But I'm really focusing on -- I don't want to get sidetracked. We have a simple -- I won't say simple, but we have a straight-forward motion for partial summary judgment that's filed by the landowner in this case and this is what they're asking for. They want summary judgment granted in an amount of $34,135,000.00. That's what they want. That's what the issue is.

MR. SCHWARTZ: Yes, Your Honor. And the City contends that all of the rules that counsel cited for granting that motion are inapplicable, and the City also contends that there are triable issues of fact.

THE COURT: Okay.

MR. SCHWARTZ: The developer paid four and a half million dollars for the property. There's been no change in the property physically or legally between that and the

alleged date of value, and so the property couldn't possibly be worth thirty-four million dollars. The City intends to introduce evidence at the trial that the developer paid four and a half million dollars. The developer disputes that. That's a disputed issue of fact.

THE COURT: All right.

MR. SCHWARTZ: The City also intends to introduce evidence at the trial that the property is part of a larger parcel, the PRMP or the Badlands, and that the alleged taking of the property had no effect on the value of the property because the property was an amenity of the rest of the PRMP. It was also part of the Badlands and you can't segment that property out from the larger parcel. I believe that the developer intends to contest that fact.

The City also contends -- I think this is a legal issue, Your Honor, that the date of value is not September 14, 2017. In a taking case -- in a regulatory taking case, given the developer's categorical and Penn Central claims which allege that the City took some action that limited the developer's use of the property and that it was a taking, the date of value is the date that the City took the alleged action. The developer is quite vague about the actions that constituted taking. The developer asked the Court to look at kind of the gestalt of the City's actions, but that's not how the law of inverse condemnation works. There is a date when

the City took an action that took the property.

The developer asserts that the date of value of September 14, 2017 is the date that the developer filed the complaint, so that's the date the developer did something. Well, that may be the date of value in an eminent domain case where the government files a complaint and the filing of the complaint is the taking. That's not true in an inverse condemnation case. If the City denied some permit application and that that was a taking, then the date of value is the date that the application was denied.

So we have no date of value here that is recognized in the law. The developer is going to rely on the Alper case and that case doesn't apply. That case says that the rules for valuation in an eminent domain case are the same as in an inverse condemnation case. But that case does not say that the date of value in an inverse condemnation case is the date of filing of the complaint. In that case the government did not -- it moved to condemn the property. It physically took the property. And then the property owner said, well, you need to pay me, you have not filed an eminent domain case, so the developer files an inverse case. And the developer argued that the date of value was not the date that the property was taken but the date of trial because the government delayed the trial. So that case did not hold that the date of value in an inverse condemnation case is the date of filing the complaint.

That would be illogical. It would make no sense because the taking is some government action and the filing of the complaint is the property owner's action.

So that date of value is wrong. We think summary judgment should be granted because the developer has no evidence of a difference between the value of the property before the take and after the take on the correct date of value. There is no -- we don't know what the date of value of the take is because the developer has never identified what actions were the taking and what the dates are of the taking. It's relying on an incorrect rule.

We also argue that there is no evidence of any damage due to the developer's physical taking claim, which it styles as a per se regulatory taking. The DiFederico appraisal only addresses the damages for the categorical and the Penn Central claim, which are the claims regarding regulation of use. So we are going to trial on a physical taking claim where the developer has no evidence of damages.

Staying with the non-regulatory taking claim, the developer has submitted no evidence as to what the City's actions were that constituted a non-regulatory taking. The developer submitted evidence of actions that constituted a regulatory taking where the government limited the use of the property by denying permit applications by requiring the developer to obtain -- to file a certain application to build

a fence and to obtain additional access to the property. Those are all claims of a regulatory taking. There's no evidence that there's any action of the City of a non-regulatory nature, other than the alleged physical taking, which there's a separate cause of action for that.

There's no evidence of any action that constituted a non-regulatory taking and there's no evidence of any damage. The developer has not only not identified what the City did to effect a non-regulatory taking, but they have no evidence of any damage. And so the City should have summary judgment on those claims where the developer has no damage. But with respect to the categorical and Penn Central claims, there are triable issues of fact.

THE COURT: Okay, sir. Anything else?

MR. SCHWARTZ: Not at this time, Your Honor.

THE COURT: Okay. Thank you.

Mr. Leavitt.

MR. LEAVITT: Yeah. Your Honor, I was looking back through the rules. I mean, 56(f) allows us to move forward with or without affidavits. I understand that the evidence has to be admissible. This is what's happened on the motion for summary judgment is the landowners file a motion and attach Mr. DiFederico's appraisal report with his certification. The City did not object to that appraisal report. It has never once objected and said, hey, this

appraisal report is not admissible as part of this summary judgment hearing. And, in fact, the City relied upon Mr. DiFederico's report and cited to it as reason for summary judgment. So we didn't have an objection from the City of Las Vegas. Had the City of Las Vegas objected, then as part of our reply we could have provided any and all evidence necessary to meet any additional heightened standard of admissibility. So, for example, Your Honor, we could bring --

THE COURT: And I don't look at it as a heightened standard for admissibility, if you understand what I mean. Either it's admissible or it's not.

MR. LEAVITT: Oh, I understand.

THE COURT: There's no heightened standard there. But go ahead.

MR. LEAVITT: I understand. And we all know, Your Honor, that once evidence is presented, if the party doesn't object it comes in, and we haven't had an objection from the City of Las Vegas. So we can remedy -- the City's first time they objected was just now on TV here at this hearing. So we just texted Mr. DiFederico, Your Honor. We can have him down here in twenty minutes and we can have him take the stand and we can have him certify to the accurateness with live testimony of everything set forth in the report so it doesn't become hearsay or so it is admissible, the same as he would do at a trial. We could have him do an affidavit right now to

further confirm the certification that he has on his report.

I mean, so my concern, Your Honor, is we've been blindsided now by the City of Las Vegas.

THE COURT: Well, I don't mind telling you, here's my concern. I'll just tell you as the trial judge and I've seen this in front of the Nevada Supreme Court. I mean, I don't mind telling you this. There might be peripheral issues that aren't necessarily ultimately germane to the case and issues regarding potential waiver and the like. And what our supreme court will do from time to time, they'll just grab onto something.

And I'm looking at it from this perspective. I understand where this case's procedure. I get it. I do. And we have a jury coming in tomorrow. There might be some issues down the road at a close of the evidence where potentially I might have -- I might look at things differently. I don't know. I have to listen to the evidence. But my point is this, and I don't mind saying this. When I read the points and authorities, and I do so in every motion for summary judgment or partial summary judgment and the like, I always sit back and then the first thing I do is conduct a Rule 56 analysis. I just do, you know. And that's why I had the questions I did because -- and you could be a hundred percent right, but until Carson City says that. And we're so close; right?

And your suggestions we can't do. I get it, Mr. Leavitt, because we can call him Monday or Tuesday and he can do the same thing. I get it, I do. And that's my concern. And just as important, too, we're talking here and I don't mind saying this, this is what I'm doing, counsel, everyone, ladies and gentlemen. I think in a general sense -- I'm not saying I'm perfect. From time to time the supreme court will disagree, sometimes they won't. And, you know, another great example of that, and I don't mind telling you that, is the one case you bring to my attention regarding a ruling I made and when I granted the motion to amend to bring in the petition for judicial review, I was never even called upon to make -- I knew they were different standards. They just threw that in there.

MR. LEAVITT: Yeah.

THE COURT: You see where I'm going on this?

MR. LEAVITT: Sure, Your Honor.

THE COURT: I mean, it wasn't even an issue and they grabbed on that. I would have -- what I would have done, I don't mind saying, since I don't have the case anymore I can say this, I would have treated them differently with different standards. I understand the different standards, preponderance of the evidence versus a standard where there's substantial evidence and the record is important, the administrative tribunal. I get that -- or plain error of law.

But they didn't see it that way. And so I'm just trying to -- I guess what I'm trying to do is -- my best way to look at it is limit potential appellate issues.

MR. LEAVITT: Understood, Your Honor.

THE COURT: I mean, I'm always going to tell you what I'm thinking and that's my thought.

MR. LEAVITT: Understood.

THE COURT: Yeah. But go ahead, sir. Go ahead. I don't want to cut you off.

MR. LEAVITT: So that -- so, I mean, we've submitted -- here's where we are on the appraisal report. Number one, it's permissible. Obviously an appraisal report is permissible. I understand the hearsay implications. That's why we have Mr. DiFederico's certification. Secondly, the government never objected to this appraisal report, and in fact relied upon it in its countermotion for summary judgment, conceding to the evidentiary value of the appraisal report. I don't have an objection from them. For the first time today they say, hey, yeah, well I guess we do object, because you brought it up. And I understand why you brought it up, Your Honor. I understand that.

THE COURT: Yeah.

MR. LEAVITT: I'm not criticizing the Court in any way, shape or form, of course, but --

THE COURT: Especially when we're so -- we're

bringing a jury in tomorrow.

MR. LEAVITT: I got it. I got it. And so that was our concern is that having this brought upon us by the City at the last minute. Obviously we could have provided an additional affidavit.

But, Your Honor, I want to address two other issues really quick that Mr. Schwartz brought up. He said, Judge, this property, 250-acre property was an amenity for all of the surrounding area and it was limited to be a golf course because it was part of the Peccole Ranch Concept Plan and we're going to argue that at trial. Judge, that ship has sailed, okay.

THE COURT: I think I've said that.

MR. LEAVITT: I know you have, Your Honor. But that's my concern. So I want to be real clear here today that the sole issue -- we've argued the property interest issue. The Court decided it. We've argued the take issue. The Court decided it. That means that the only issue for trial is what is the value of that property taken on September 4th, 2017? That's it. We don't have a before condition and an after condition value. We don't have a before this or before that. It's just the City took that property. This case has been converted to a direct eminent domain case, meaning that the City has been found liable for the taking, and the sole issue is how much the City has to pay for that taking.

What I'm hearing from counsel is they're going to try and reargue everything. They're going to try and reargue the PR-OS, the PRMP.

THE COURT: I don't mind cautioning everyone on that. And we're all professionals and we understand that, you know, at the end of the day we're a country based upon the rules of law. And what I mean by that is this. If a trial court rules and you feel that the trial court has made a mistake in a ruling as a matter of law, plain error or abuse of discretion or whatever, you live with the Court's rulings; right? That's what you do. In front of a jury you live with the Court's rulings. And then what you do is this. You appeal it. That's all.

MR. LEAVITT: I agree.

THE COURT: You make your record and you appeal it. And I've had -- and I look back, I mean, I look back at some of the cases I've had and I've had issues where that has come up. And to be candid with you, this might have been ten, twelve years ago, it kind of surprised me that someone would violate a court's order, but they do. And I'm much more well aware of that. And I'm not saying in this case Mr. Schwartz and/or the City would do that, but I just want to just caution everybody just to remember what is the procedural posture of the case. Right? That's all. Because to be candid with everyone, I'm looking at it from this perspective. We could

be done with this case, potentially submit it to the jury by Thursday of next week.

MR. LEAVITT: I totally agree, Your Honor.

THE COURT: You know, because it's a simple issue. It really is. What's the value?

MR. LEAVITT: Right. And I agree, Your Honor. And that's, of course, what we have prepared and we prepared an appraisal report that determines that value.

Here's where I'll end, Your Honor. We have that appraisal report, which addresses that one issue. The City has conceded that it has no other evidence to contradict that. It has simply argued legal arguments to this Court, the PR-OS legal argument, the PRMP legal argument and the date of value legal argument. It loses every one of those. Not once did the City say we dispute the value and here's our evidence of that dispute as of September 14th, 2017. That's what our concern is and that's why we brought this motion now is because the City has produced no valuation evidence as of September 14th, 2017.

And a simple question could be to the City: Do you have any valuation evidence as of September 14th, 2017? If the City answers that question no, we don't, then, Your Honor, we're here now with one appraisal report. Mr. DiFederico. As of September 14th, 2017, the $34,135,000. All I heard from the City was it's going to try and reargue the legal issues.

That's it and that's what they put in their -- that's what the City put in its countermotion. Not once did the City say we have disputed evidence.

Your Honor, we do have the duty to bring forth evidence and present it to the Court and we've done that and we've met our burden. Here's our evidence. Here's our admissible evidence. We have a certification of it on $34,135,000. The City now has a duty as part of the summary judgment hearing to say, Judge, here is our contrary valuation evidence as of September 14th, 2017. Not something which is ten years old, not something which is seven years old, not even something, Your Honor, which is two years old. The City has to have valuation evidence as of September 14th, 2017. And if the City says to you today at this hearing we don't have valuation evidence as of September 14th 2017, then, Your Honor, summary judgment should be granted. And I will tell you, Your Honor, I know the City doesn't have valuation evidence as of September 14th, 2017. I know that because we don't have it from them.

So, Your Honor, I believe that we've met that evidentiary threshold and provided that evidence as of September 14th, 2017. And the City has to bring something to rebut that and the City does not have that. For that reason, Your Honor, we think that this is appropriate for summary judgment based upon that appraisal report and that

certification that we've submitted to the Court.

THE COURT: All right. And I guess we do have the countermotion with the reply. Anything you want to add, Mr. Schwartz, as far as your reply is concerned, sir? Are you on mute, sir?

MR. SCHWARTZ: Sorry, Your Honor. No, I think we've made our position clear that there are triable issues of fact as to the value. We intend to present evidence at the trial of the value of the property through the sale of the property to the developer, which the City contends was four and a half million dollars. And we intend to use that evidence to rebut Mr. DiFederico's appraisal. And the burden is on the property owner here to establish the value, and if Mr. DiFederico's appraisal fails to establish the before and after value, then the City should be entitled to the jury's verdict. So that's our case.

I would appreciate clarification. The City does not want to attempt to submit evidence at the trial that the Court has determined is not admissible, is not proper evidence. And I would like to be perfectly clear that the City is not to present or mention the PR-OS designation. As the Court said, it's irrelevant. So I take that to mean that the City is not to mention the PR-OS designation because that's our primary basis for challenging the DiFederico appraisal, that Mr. DiFederico has assumed a use in the before condition that was

not legally permissible. But if that -- I would like to be absolutely clear that that's the Court's ruling.

I also would request the Court to clarify whether the City would be permitted to submit evidence of the larger parcel. The larger parcel is an issue in any valuation case. And while it is also an issue in liability for a regulatory taking claim because the Court has to look at the economic impact of the regulation on the parcel as a whole or the larger parcel, it is also an issue in the valuation phase of a case. And --

THE COURT: But here's my question on that. And as far as the designation is concerned, I've ruled as a matter of law on that, so my decision will stand. Secondly, when it comes to issues regarding the importance of the larger parcel and how that would impact value, I would think as a threshold before you argue that to the jury you'd have to have an expert appraisal opinion on that specific issue. And if the City has no expert, that's not coming in, either.

I just want to make sure I'm clear on that because we're talking about potential issues that impact value, and making those types of arguments you have to have an expert to lay the foundation for that argument. If you don't have an expert, right, as it pertains to valuation, that actually would impact any potential arguments you can make in front of the jury. Right? I mean, I get it. I do. We dealt with

a lot of valuation issues. And when I look back, we had a construction defect case after two subclasses involving 30,000 homes that ultimately settled for close to three hundred million dollars. And my point is, I understand valuation. And it doesn't matter whether it's a tort case, this type of case or what, you've got to have experts to come in on those specific issues. And so hopefully I answered --

MR. SCHWARTZ: Your Honor, could I be heard on that?

THE COURT: Go ahead. Because that has to be developed.

MR. SCHWARTZ: Yes, it would, Your Honor. And the burden is on the property owner to establish the before and after value. If the appraiser, the expert for the property owner, has failed to consider the larger parcel, then the appraisal is invalid. The evidence of the larger parcel --

THE COURT: Well, here's the thing about that. You're making that argument, but that's argument. Right? That's argument. But my point is this. I'm going to listen to the appraiser and he's going to put on evidence as to the foundation for his opinion as it relates to the 35 acres. And I realize his deposition wasn't taken. It probably should have been taken. What I mean by that is this. We don't know -- I mean, you have a general sense, based upon the report, as to what their testimony is, but there can be ancillary issues

that are connected to that. You can't put everything in writing. But I still, and we can't over look this, I understand what the property owners' burden is in this case, but just as important, too, I would anticipate the City has burdens vis-a-vis as affirmative defenses in this case. Right?

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: And so that's my point. You can't make argument without evidence to support it.

MR. SCHWARTZ: Your Honor, the evidence we intend to present is the history of the development of the Peccole Ranch Master Plan. And --

THE COURT: That's going to be another issue that's going to be part of the motion in limine tangentially, I think, as it pertains to what the purchase price of the property would have been. Right?

MR. LEAVITT: And we also have an order.

MR. SCHWARTZ: No, that's a different issue, Your Honor. And there's no motion in limine concerning the evidence of the larger parcel.

THE COURT: No, no, no. I'm talking about --

MR. SCHWARTZ: The evidence of the larger parcel --

THE COURT: I'm talking about the 2005 purchase price; right? And so here's my point. You're making arguments about the larger parcel and I've ruled as a matter

of law already, so that's not coming in; number one. But secondly, if you wanted it to come in, it's something that would have had to have been developed vis-a-vis expert testimony, I would think, as to why it's important to also consider the larger value. And then I can conduct a Hallmark type of analysis and determine whether it meets the assistance requirement or not. Right?

MR. SCHWARTZ: Well, Your Honor, I don't think we need a deposition to challenge the --

THE COURT: You need an expert, sir. You need an expert.

MR. SCHWARTZ: We -- the evidence we would present of the larger parcel would come in through the City's Community Development director and that would be evidence of public records showing the evolution of the development of the PRMP and how the subject property fit within that larger parcel. And that would be evidence that would refute the appraiser's assumption --

THE COURT: Says who?

MR. SCHWARTZ: -- that the larger parcel [video skips] the 35-acre property.

THE COURT: You'd have to have an -- no, no, no, no. You can make the record, but I think you'd have to have a duly designated expert pursuant to the discovery period to even make a threshold argument on that. And I'd have to make

a determination as to whether it's reliable or not. Because, remember, this is trial and under our Rules of Civil Procedure it's not like we used to have thirty years ago, just throw it all up against the wall and everything goes. It's not like that. Our supreme court has really pulled away from that.

MR. SCHWARTZ: The larger parcel is a question of fact. The larger parcel is a question of fact. And if the appraiser has failed to consider the larger parcel in the appraisal and that evidence would come in through not an expert but through public records, then the appraisal can be challenged. It's a question of fact.

THE COURT: It's not a question of fact. It's an evidentiary issue. You've got to have an expert for that. You just can't argue. I don't mind saying that. That will be good for the record, too. You just can't argue that.

All right. Anything else I need on that?

MR. LEAVITT: Not from the landowners, Your Honor.

THE COURT: Okay. This is what I'm going to do, and I think it's somewhat obvious based upon my discussions. But regarding both motions for summary judgment, I'm going to deny those. And I don't mind telling you this, Mr. Leavitt, I'm a little -- I don't know what a reviewing court will do and I think that one matter you brought to my attention is a classic example. We're close to trial and we'll be in trial next week. We'll hear what your expert has to say and so on. It

would be too late to bring him in procedurally and all that. I don't want to create some quagmire. We're also going to deny the countermotion for summary judgment.

So let's go ahead and move forward with Plaintiff Landowners' Motion in Limine No. 1: To Exclude the 2005 Purchase Price.

MR. LEAVITT: Thank you, Your Honor. May I proceed?

THE COURT: Yes, you may.

MR. LEAVITT: Your Honor, this one is -- I mean, we have a general rule. You know the general rule, Your Honor. Very briefly, it's only relevance evidence is admissible.

THE COURT: Right.

MR. LEAVITT: And if it's overly prejudicial, it doesn't come in. And what has happened in this specific area of eminent domain is the courts have said, listen, the purchase price can be extraordinarily prejudicial because a jury might hear a purchase price and say, hey, this guy has already made a bunch of money; let's just give him a million more dollars. And will fall well short of just compensation.

In fact, one court was really, really clear on that. They said, Admitting a low purchase price puts a landowner, quote, "in the position of seeking what some might regard as an excessively large profit on a comparatively small investment, which is clearly prejudicial." There can be no doubt, Your Honor, that if this type of evidence comes in

it's going to be clearly prejudicial to the landowner. I mean, we can take --

THE COURT: I don't mind saying this. Even as a threshold evidentiary issue, before I could even consider the purchase price I think first we'd have to have an expert that would say that's somehow relevant to the calculation. And we don't; right?

MR. LEAVITT: No. And you're absolutely right. Not only would that expert have to say it's relevant, but then what the expert would have to do is after that expert determines it's relevant, he or she would then have to adjust that price all the way up to our current date of value to make it relevant. So not only do you have to have the expert say it, but they have to adjust it.

Your Honor, the Nevada Supreme Court has been very clear. When we're in an eminent domain case, all evidence must be presented that proves the value of the property as of the date of vale, okay. So they have to first say, hey, I'm going to use this and then say -- adjust it up. Mr. DiFederico is the only expert that has reviewed that and said it's entirely irrelevant, okay. The City doesn't have an expert to rebut that. The City doesn't have anybody to come in and say that this is a relevant part of this case.

And, Your Honor, I want to go through just a couple other reasons that the evidence should be excluded. The

courts have been very clear that if you're going to include the purchase price, it has to be for substantially the same property that's included in that purchase price. Clearly we don't have that here. We have a 35-acre property that doesn't have any drainage issues and we have another 215 acres that has some drainage concerns. And that purchase of the property was for that entire 250 acres. So the purchase price doesn't even apply to this portion of the property. It wasn't -- the purchase price wasn't even towards this. So what you would not only need there, you'd need an expert so say, hey, it's relevant and then somehow parcel out how much of that purchase price was attributed to the 35 acres. No expert has done that, Your Honor.

In addition to that -- and Your Honor, I just -- this is what I did. What the City wants to tell the jury is that in 2005 the purchase price was $18,000 an acre and that's relevant. Your Honor, I think you saw in the motion, and I printed it out, I was going to hand Mr. Ogilvie a copy. I won't, but I'll just hold it up to the Court here and you can see it here, the sales that have occurred in the area. And, Your Honor, if I may come over here, most of these -- a great portion of these sales are right in here. There's four sales right in this area of the 35-acre property that are between eight hundred thousand to a million dollars an acre. Across the street are custom homes. Up here is Summerlin. Below the

landowners' property is Summerlin. It's within the Queensridge community.

And what the City wants to stand up and tell this jury, Your Honor, is that even though the properties are selling for a million dollars an acre in this area, that the purchase price of $18,000 an acre is relevant. That's what the City wants to do. And they got nobody. They could not find anybody, Your Honor, and I have to assume they looked. They could not find any expert that was willing to come into a court, raise their hand to the square and say I testify under oath that this is relevant.

THE COURT: Well, I actually opened up discovery and gave Rule 56(d) relief specifically for this purpose, going to the valuation and economic impact. That's what I thought; something like that. Understand, I've another 800, 900 cases, but I think that's kind of what I did.

MR. LEAVITT: That's exactly what you did, Your Honor. And, Your Honor, here's what's even the great -- even one of the greater concerns here, is we've laid out the history of this purchase. What the government says is the purchase price isn't even the purchase price. It arose out of some extraordinarily complex transactions. Their own attorney admitted that at the end of the day when these transactions closed, they had a lot of hair on them. The two persons most knowledgeable on both sides of that transaction, the buyer

and the seller both said that this transaction started in 2005 with an option and that it was extraordinarily complex. Not even the buyer and seller could agree upon what the price was that was paid because there were -- not only was the Quuensridge Towers involved in it, Tivoli Village was involved, Sahara Commons, a shopping center at the corner of Sahara and Hualapai was involved in this overall transaction. At the end of the day when it closed it was the acquisition of an entity and in that entity were personal property and other effects, licenses. There was a liquor license involved.

Your Honor, I'll sum it up this way. There was a veteran attorney who was involved in this case at one time and he said, listen, it's taken me a super long time to even get my arms around these transactions. So we don't even have agreement on what the purchase price was. And then there was an element of compulsion as part of this because back in 2005 the Peccole family couldn't meet certain capital calls. The Queensridge Towers were built on part of the golf course. And so there was an element of compulsion that they had to enter into this agreement to give the landowner the option in 2005.

Now, the first thing Mr. Schwartz is going to do is he's going to stand up and say, Judge, there wasn't an option in 2005. Mr. Bayne's deposition was taken. He was the Peccole representative. He admitted there was. Mr. Lowie's deposition was taken. He was the buyer of the property. He

stated there was.

So, Your Honor, we have a transaction that doesn't even cover the property at issue. It is extraordinarily complex. It has a lot of hair on it. And not one expert. The City couldn't even find one expert to say that it's relevant to the 2017 date of value.

So here's our concern, Your Honor, is at the end of the day if this evidence comes in, not only has the threshold requirement of relevance not been met through an expert, not only has it not been adjusted, not only has the price not been parceled out to apply just to this 35-acre property, but then we have the profound prejudice that can happen even if it was found to be relevant.

What would the jury say? The jury would say, listen, I understand that there's properties that all sold around this area for over a million dollars an acre, but hey, this guy only paid a little bit of money; right? And that's what the government to try and argue. That's what they're going to argue. And I'm assuming they'll tell you this, Judge. The landowner only paid a little bit of money, so we don't think he should get just compensation. That's really what their argument is.

And, Your Honor, we obviously disagree with the little bit of money. There's a huge disagreement about how much money was paid. But that's not what this case is about.

This case isn't about how much the landowners made or how much he should make. This case is about what is this property here, this 35 acres right here, what is it worth as of September 14th, 2017? That's it. And, Your Honor, as the Nevada Supreme Court stated, this is a battle of the experts. Only experts can testify to that value. And nobody has testified that this is relevant.

If I may have -- Oh. Well, you know what, Your Honor, I mean, I'll just address very quickly, the government has three arguments for why they want to bring it in. They say, well, it supports their PR-OS argument. We know that's not coming in because that's been a legal issue already decided. They also say that it supports the fact that there's been no taking. We know that that argument is not coming in because there's a taking been found.

And then they say, well, Judge, we have this 2010 appraisal report. They just disclosed it like two weeks ago, Your Honor -- the City did. This 2010 appraisal report where the appraiser valued income that the Peccoles were receiving on a golf course lease. He didn't appraise the real property. He didn't appraise the residential use. He didn't appraise the property as of the date of value. But the City says this purchase price is relevant to that and we're going to bring those in and we're going to give them to the jury.

Judge, I don't know how they get in an appraiser

that they disclosed two weeks ago that didn't even appraise the property at issue; didn't even appraise the real property; didn't use the date of value and didn't even -- didn't even appraise the property as a residential property, which is required to do in this case.

So, Your Honor, the three -- the underlying three reasons the City wants to bring in this purchase price have been either rejected by this Court or are entirely irrelevant. So for those reasons, Your Honor, we respectfully request that this purchase price evidence be excluded in its entirety.

Now, I will end with this. There are some cases where purchase price evidence comes in, but we didn't have this in those cases. These are the comparable sales in the area, Your Honor. On this list alone right here, and these are just some of them, are three, six, ten -- there's about 22 comparable sales in the immediate area of the subject property in this case which can be used to determine the value --

THE COURT: But I would think, and, you know, I don't mind -- I mean, yeah, we don't handle many inverse condemnation cases, but the law is the law when it comes to issues regarding damages; right? It just is. And there's no wild deviation. Everyone has a burden of proof. You have your expert. And just as important, I mean, for example, it doesn't matter whether this is a tort-based case or not.

And a good example is Giglio. She had a pre-existing condition. I determined it was too remote in time. You have a remoteness that also impacts valuation. For example, here you're talking about a transaction in 2005. How is that relevant to the value of real property per acre at this location on October 26, 2021; right? Just as important, too, if there's some other event or something like that and you wanted to bring a purchase price in, I would anticipate it would have to be coupled with an expert opinion to explain to me why that would be relevant. That gets tested under Hallmark. I'll make a determination as to whether it meets the assistance requirement, whether it's reliable, whether it's peer reviewed and all those wonderful types of things.

So my point is this. It doesn't matter what type of case it is. The law is the law. And I get what you're saying here and there's a lot of issues here, but at the end of the day as -- at the very outset, I would think, if you want to bring something in you have to answer what I call the for what purpose doctrine; right? And it deals with all types of evidence. For what purpose is this evidence being offered? Well, it's being offered as a -- here's a really great example. It would be like in the Wiliams case and they talked about independent alternative causation theory; right? Kind of like the same thing. You're giving an alternative value.

Well, you know what? That has to be testable. It has to be peer reviewed. It has to be reliable and all those wonderful type things.

And so my point is this. I get it as far as what the burden is. And so what I want to hear from the City is, okay, what do you have and why would that be relevant? For what purpose is it coming in? Is it testable? Does it meet the assistance requirement under Hallmark? I get it.

MR. LEAVITT: Yeah. And, Your Honor, and I'll sit down right now.

THE COURT: Is it too remote?

MR. LEAVITT: Right.

THE COURT: I mean, you actually talk about remoteness on page 16, I think, of your motion.

MR. LEAVITT: Yeah. You're absolutely correct. And I'll sit down on this point. That's why the federal law and Nevada law require the government to hire an appraiser, because that appraiser could have analyzed this and explained to the City why it's irrelevant. The City didn't do that, Your Honor.

THE COURT: Or it could have been I looked at it -- and I'm not saying necessarily I would have bought it, but it would make my job much easier if I had an expert come in and say, well, Judge, under the limited exception of this case, this is why it's relevant. And then we can test it.

MR. LEAVITT: Yeah.

THE COURT: But I don't even have that.

MR. LEAVITT: Understood, Your Honor. And there's five or six reasons that we add in our brief. I'm not going to go through them again, but I'll submit on the brief, Your Honor, those additional five or six reasons for why this clearly is legally inadmissible in this type of proceeding, Your Honor, and overly prejudicial.

THE COURT: I understand.

MR. LEAVITT: Thank you, Your Honor.

THE COURT: Okay. Mr. Schwartz, sir.

MR. SCHWARTZ: Thank you, Your Honor.

Your Honor, the sale didn't occur in 2005. The sale occurred in 2015, in March. Exhibit AAA, which was your tab 59 in the documents we submitted in previous hearings, is the membership interest purchase and sale agreement that shows that the sale of the Badlands, the 250-acre Badlands occurred in March of 2015. Now, we have evidence from the seller and a series of communications in 2014 and 2015 between the buyer and the seller that show that this was an arms-length transaction, that both the buyer and seller were knowledgeable, that this sale meets the definition of a fair market sale under Nevada law, and that the sale occurred in March of 2015. We have in Mr. -- all those records we would submit through the deposition of Bayne, who was representing

the seller of the property.

Now, what we have there is a sale at $18,000 an acre for the entire 250 acres of the Badlands. And whether the 35-acre property is worth more or less than other parts of the property is not relevant because the appraiser for the developer claims that the property is worth a million dollars per acre or near a million dollars per acre.

Now, the developer has the burden of proof on the issue of damages, which is the before and after value, and the credibility of the appraisal is at issue. And the City doesn't need an expert to attack the credibility of the appraisal. The jury is asked to determine whether that appraisal is credible or not. And the jury should hear evidence that the developer bought the property in 2015 for four and a half million dollars for the entire property and whether that was a fair market sale. Now, there has to be a presumption that this is an excellent comparable because it's the same property. You don't have to -- [inaudible].

THE COURT: Why does it have to be a presumption on anything? I mean, there's no law that says this is a presumption; right? And my point is this. I mean, I'm listening to you, sir, but at the end of the day you're making arguments, but I would anticipate that your arguments would have to be substantiated by expert opinions that go to the sole issue of valuation, of value; right? And if you don't --

MR. SCHWARTZ: No.

THE COURT: No, no, no, no, no. You're saying that. To me it would be like trying to come in and argue a person suffered an injury without a doctor. I mean, I just use that as an example. But you've got to have an expert when it comes to real estate appraisal and valuation.

MR. SCHWARTZ: Your Honor, could I address that, please?

THE COURT: Please. Please.

MR. SCHWARTZ: The appraiser for the developer has relied on five comparable sales. One of those sales was the month before the developer purchased the Badlands. It's from February of 2015. So the appraiser himself should have and the City has the right to prove that the appraiser did not consider what is essentially a perfect comparable, and that the appraiser's value of a million dollars per acre is not credible because a sale that occurred during the time frame that the appraiser admits is relevant, a sale occurred of the same property. So the appraiser doesn't have to make adjustments for location or offset improvements or topography or size or shape or any of the other adjustments. The developer's appraiser refused -- failed to consider a perfect comparable of property that demolishes the developer's value.

So the jury ought to hear that, that the developer paid $18,000 an acre in an arms-length transaction. It's a

fair market sale. We have strong evidence of that that we'd like to present to the jury. And that the developer's conclusion of value is simply not credible. There were no legal changes. There were no physical changes in the property between the date of value and the date of purchase.

So I think the jury is asked to evaluate the credibility of appraisers. If there are two appraisers, the jury evaluates the credibility of the two. But the jury -- juries [inaudible] and do evaluate the credibility of an appraiser based on not only the evidence presented on direct but on cross-examination. Cross-examination, of course, is sacred in this country as the revealer of truth. Without cross-examination we -- you could get away with just about anything. But this appraiser has excluded a perfect comparable, and on cross-examination the City would like the opportunity to show that the appraisal simply is not credible.

The jury doesn't -- this is an inverse condemnation case, it's not an eminent domain case where there are two appraisers, one for each side, and the jury has to choose between the two. This is an inverse case there the developer has to show damages based on the change in value before and after the take. So the jury is entitled to determine whether the developer suffered any damage at all and they're not bound by what the appraiser says. They can -- the City intends to

use some of the evidence that the appraiser has submitted of his comparable sales and show, well, we've got a comparable sale here that's a perfect comparable that this developer and the developer's appraiser simply refused to consider, and that goes to the appraisal's credibility.

Finally, this -- the sale was in 2015. There was no sale in 2005. The developer admits it has no documents, no documents whatsoever -- we've submitted to the Court the developer's response to interrogatories and request for documents where the developer says that they have no documents, no documents whatsoever that show that the purchase price of this property was anything other than 7.5 million. And we have evidence through the seller and through other documents produced by the developer, we have the seller's concession that three millions dollars of that purchase price was consideration for other property, putting the purchase price for the entire Badlands at 4.5 million.

It's impossible for that property to be worth 34 million two years later, which is essentially a 3,500 percent increase in value. The City ought to be allowed to submit this evidence to the jury. If the developer wants to contend that the sale occurred in 2005, they've admitted that they have no documents showing that the sale occurred in 2005. The developer contends that the sale price was $45 million. The developer admits they have absolutely -- they don't have

a scrap. They don't have a single document to show that that was the purchase price.

So we ought to let the jury decide whether the developer has any credibility in saying that the sale occurred in 2005 and that the purchase price was 45 million and that the purchase price was not 4.5 million. That's -- those are all issues of fact and they go directly to the developer's appraisal's credibility, so the City ought to have an opportunity to present that to the jury. Thank you.

THE COURT: Okay. Here's my question. Don't you feel that at some threshold the arguments you're making should be supported by expert opinions as it pertains to valuation in this case? Because you're making arguments and I understand the position you're taking, but -- I mean, another point, too, I was just thinking about as I was listening to you, this isn't the time to conduct discovery; right? I mean, discovery is done. And I would anticipate that when it comes to the 2015 transaction, whatever it might have been, that that would have been developed during discovery. And just as important, we would have some sort of expert opinion in this case specifically focusing on that.

MR. SCHWARTZ: That's a question of fact, Your Honor.

THE COURT: That's not a question of fact.

MR. SCHWARTZ: That's for the jury to decide when

the sale occurred.

THE COURT: No, I'm talking about the valuation issue and why the 2015 would be relevant in this case. That's what I'm talking about. Remember, it doesn't become a question of fact until the questions of fact are developed.

MR. SCHWARTZ: It doesn't require any development. It's market data and it undercuts the credibility of the developer's appraisal. The jury is supposed to make these determinations. What's the relevant market? What's the highest and best use? The jury makes all those determinations as to whether --

THE COURT: Don't you -- no, no, no. No, the jury is assisted by expert testimony to make those types of decisions. And so what evidence do we have that whatever transaction occurred in 2015 would have been the highest and best use for this property? It's a good question, isn't it?

MR. LEAVITT: Uh-huh.

MR. SCHWARTZ: Well, that's -- the jury determines whether there is a contract of sale.

THE COURT: No, no, no. You didn't answer my question. What evidence in the record do we have by an expert to support that statement you made that the jury is going to determine the highest and best use as it pertains to the 2015 transaction? Whatever that might have been. So I'm just calling it a transaction.

MR. SCHWARTZ: Well, I think the Court -- the issue is the market data. The highest and best use, I think the Court has ruled out the City's challenge to the developer's contention as to the highest and best use. So the issue now is are these sales indicative of the fair market value of the property on a particular date?

THE COURT: Okay, fine.

MR. SCHWARTZ: And that is an issue for the jury.

THE COURT: Here's my question, though. I'm not disagreeing with that statement. My question is this. What expert opinion has the City proffered in this case to support that argument?

MR. SCHWARTZ: The argument that the $4.5 million sale of the property is relevant to the market value of the property?

THE COURT: Absolutely.

MR. SCHWARTZ: We don't have an expert to say it's relevant, but I think we've got overwhelming evidence --

THE COURT: No, no. That it's relevant to the valuation for highest and best use in this case.

MR. SCHWARTZ: The $4.5 million purchase price does not go to the highest and best use issue. I think the Court has ruled it is a matter of law that the residential use was a legally permissible use as a matter of law. So that question has been decided. We can't present any evidence --

THE COURT: Wait, wait, wait, wait, wait. You just changed your argument slightly. What expert do we have in this case to support your argument that whatever transaction occurred in 2015 is germane to the value of this property as it pertains to the alleged taking date set forth by the plaintiff? I think -- was that September 14th, 2017?

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay.

MR. SCHWARTZ: We don't have an expert opinion that says that that sale is relevant. It's just obvious to a lay person that a sale of the very same property within the time frame that the developer's appraiser says is relevant, a sale of the very same property for a tiny fraction of what the developer's appraiser is saying the property is worth, that certainly goes to the developer appraisal's credibility. And we don't need an expert to say this sale is relevant.

I mean, you sell a house. You buy a house. You look at what similar properties are selling for in the neighborhood. Lay people do that all the time. That's why juries are allowed to decide value in eminent domain cases, because they evaluate everything that the appraiser does, all the assumptions, all the market data, and they decide whether it's credible or not. So when the developer's appraiser leaves out the best indication of market value of the property, then we're entitled to -- the City is entitled to

use that to question the credibility of the developer's appraisal.

The jury decides the value. They can decide that the value is whatever they want. There's no limit on what the jury can decide. They could decide that the property is worth $18,000 an acre, which is what the developer paid for it.

THE COURT: All right. Mr. Schwartz, anything else?

MR. SCHWARTZ: No, Your Honor.

THE COURT: Thank you.

Mr. Leavitt.

MR. LEAVITT: Your Honor, we pointed in our reply -- thank you. First of all, so Mr. Schwartz said it's obvious that anybody who comes out and appraises this property would have used that 2005 purchase price. You know who it wasn't obvious to? The City Tax Assessor. The City Tax Assessor went to evaluate this property for tax purposes. You want to know what sale he didn't use? This alleged 2005 or 2015 sale. He used sales that ranged from $500,000 an acre up to one million dollars an acre. Why? Because that 2005 and 2015 sale is entirely irrelevant to the highest and best use of this property as a residential property as of September 14th, 2017. The assessor evaluated the property as of 2016, December 2016, even closer to what Mr. Schwartz says is the 2015 sale, and didn't consider it. Why? Because it's irrelevant. Nobody has used it, Your Honor. Nobody has used

it because it doesn't go anywhere near to the value of the property based upon its highest and best use.

And, Your Honor, counsel keeps saying that this transaction occurred in 2015. I'm just going to read you one thing. This is Mr. Bayne's deposition.

"Question: Understood. Do you know whether Mr. Lowie had an option to purchase the property in 2000 -- prior to 2006?"

"From these documents we looked at today, it looks like he did."

So, Mr. Bayne and Mr. Lowie agreed that the transaction to acquire the 250-acre property was entered into in 2005. Counsel here is just making argument. Every single thing we just heard from counsel was just argument. So what he wants to do is he wants to add -- and I'll tell you, Judge, it will add three, possibly four days to this trial. Here's why. He took the deposition of Mr. Lowie. It went on for eight hours on this one issue. He took the deposition of Mr. Bayne. It went on for eight hours on this one issue. And you know what came out of that? This isn't relevant. Mr. Bayne himself said I don't know what the value of the property is as of September 14th, 2017. He said that right on the record. He's the seller -- or the person most knowledgeable regarding the property.

So, Your Honor, no expert has come here to testify

that this is relevant in any way, shape or form. And you heard Mr. Schwartz just do it. He said we're going to tell the jury that the property is only worth $18,000 an acre, without an appraisal report, without an expert. And when all the sales in this area range from a million to three million an acre, the only reason he would introduce that -- he knows it's not relevant -- is to prejudice the jury, Your Honor, and he shouldn't be permitted to do it in this case. So we respectfully request that it be excluded.

THE COURT: Okay. As far as Plaintiff's Motion in Limine No. 1, I'm going to grant the motion. And I think we have a very vigorous and well-developed record on this specific issue. But I don't mind saying this. I don't see how it's relevant; number one. Secondly, it's remote. Just as important, even for me to even consider it you'd have to have expert testimony to lay the foundation for it. This is akin to -- this is an independent evaluation. You've got to have an expert on that. You just do. You just can't point to records and documents and make arguments to the jury, especially in this case, because let's face it, it's a complex valuation case. It just is, and we're talking about residential real property located in a specific area in Summerlin. There's comparables and the like. And I just don't see how you can do it without an expert; right?

And just as important, too, we talk about the right

to cross-examination, but cross-examination -- the foundation of cross-examination can't be based upon irrelevant evidence. It has to be relevant. And that's why we file motions in limine; right? That's what we do. So that's going to be my decision.

And so let's move on to the next matter. What's Number 2? That's Plaintiff Landowners' Motion in Limine No. 2: To Exclude Source of Funds.

MR. LEAVITT: Yeah, Your Honor. I'll be very brief on this. Again, there's one issue. What's the just compensation as of September 14, 2017? Coming in and telling the jury, hey, jury, you have to be fair to taxpayers, or, hey, jury, you have to be fair to the public puts the jury in the position of paying the verdict because they're part of the public, they're part of the tax-paying community.

Our concern here, Your Honor, is that the City is going to do that. It will be an immediate mistrial. We don't want a mistrial. That's why we brought this motion. All practitioners in the area of eminent domain know not to do this.

THE COURT: This would be like bringing up, well, it's going to impact your insurance rates.

MR. LEAVITT: Exactly. It's going to impact your insurance coverage so, hey, don't give this guy any money. That's what it comes down to. And, Your Honor, you'll

remember that during discovery we actually asked the City what the source of funds would be to pay, and the City said it's entirely irrelevant. And this Court will recall and we didn't challenge it. This Court said, listen, as a trial judge I would never let into evidence in front of a jury or any argument that says taxpayers are going to be on the hook for this and as a result we shouldn't award money and give them their civil rights. So, Your Honor, and you were right. You were totally, one hundred percent right. Your decision on the discovery issue is in compliance with the case law we cited.

So here's what the City can't do. They can't say, hey, taxpayers are going to pay the verdict. They also can't say, hey, the public is going to pay the verdict because they're the public. There's no reason to say that. None. All the City has to do is come in here and present evidence of the value of the property as of September 14th, 2017. Who pays that verdict is entirely irrelevant, Your Honor, and therefore it should be excluded.

THE COURT: Okay. Thank you, sir.

We'll hear from the opposition.

MR. SCHWARTZ: Your Honor, the City had no intention of using the word taxpayers in this trial. The City merely wants the trial to be fair to say that the verdict has to be fair to both the developer and the public. We're not going to say that they -- to the public this or the public is going to

pay the verdict. We're going to say the developer -- the verdict has to be fair to both parties.

THE COURT: And this -- you get the last word, sir. I'm sorry.

MR. LEAVITT: Same thing, Your Honor. It's the same thing saying the taxpayers and public. Everybody knows it.

THE COURT: Right. I'm going to go ahead and grant Motion in Limine No. 2. There's no need to mention the public and/or taxpayers in this case.

Let's move on to Number 3.

MR. LEAVITT: Your Honor, Number 3 is to exclude any argument of the PR-OS or PRMP, Peccole Ranch Concept Plan. You've already, I think, made it abundantly clear here today that the City is not going to be permitted to come in and reargue issues that it already argued. The City argued ad nauseam this issue of PR-OS and PRMP. This Court ruled against the City, finding Number 39 that just came down yesterday.

THE COURT: I mean, the bottom line is this. That would be akin to me granting a motion for partial summary judgment on the issue of liability and then permitting liability to be argued in front of the jury.

MR. LEAVITT: Right. And so, Your Honor, Finding Number 39 says the City can't -- it ruled against the City on both of these issues. Therefore, the City should be

prohibited from bringing them in a trial, Your Honor. Straightforward, very quick argument. And, Your Honor, I could go through, if you want, the Bustos case, where the Nevada Supreme Court held this exact same issue, that when you're valuing property you don't talk about the master plan, you talk about zoning. And that's how this Court ruled. And so we want to move forward, Your Honor, with a trial on the highest and best use as residential and not discuss this PR-OS or PRMP that's already been denied, Your Honor.

THE COURT: Okay. Thank you, sir.

We'll hear from the City.

MR. SCHWARTZ: Your Honor, I think I understand that the Court is -- will not allow the City at the trial to mention the PR-OS designation of the property. The City contends that that goes to the highest and best use, which is an issue in value. I would, however, like to make a record, if I could, Your Honor.

THE COURT: Oh, sir, I always respect that. Of course I'm going to give you an opportunity to make your highest and best use as far the record is concerned.

MR. SCHWARTZ: All right. Your Honor, in the interest of time, could the City -- the City would like to file a written offer of proof on this and other issues. So would the Court -- with the Court's indulgence, we would just file a written offer of proof on a number of issues just to

put it in the record.

THE COURT: But, I mean, I have to know what the --

MR. SCHWARTZ: I don't want to take up everybody's time.

THE COURT: No, no. But, I mean, that would be potentially unfair to me and also the adverse party. And what I mean by that is if there's other issues out there -- and I know this for a fact. I don't mind saying this. I've walked into the chambers of a couple of our justices and they work very hard; number one. And number two, I was -- it kind of reminded me because the lights are somewhat dark and they have these two big computer screens up and they were looking at the records. And I can tell you there's a couple justices, they read these transcripts. They do.

And I know this. They appreciate when there's a well-developed transcript because that makes their job easier, instead of trying to guess why the trial judge did this or that or what the basis of his or her ruling might be. If the trial court states it for the record, then they can make a determination very quickly.

So all I'm saying is if there's anything you want to say, sir, go ahead and say it, because maybe I'll have --

MR. SCHWARTZ: All right. Thank you, Your Honor.

THE COURT: Maybe I'll have something to say, maybe I won't, but you've got to make your record.

MR. SCHWARTZ: All right, Your Honor. Thank you. Tab 19 in our documents is Nevada Revised Statutes 278.150. That provides that the planning commission of a city shall prepare a comprehensive, long-term general plan which in the commission's judgment bears relation to the planning of the physical development of the jurisdiction. And section 2 of that section says that the plan must be known as the master plan and must be prepared as a basis for the development of the city. In section 5 of that statute the legislature provides that the governing body or the city shall adopt a master plan for all of the city and county that must address each of the elements set forth in paragraph a through h, inclusive of section 278.160.

Section 278.160 provides that the master plan shall have a land use element in subsection D that concerns community design and standards and principles governing the subdivision of land and suggested patterns for community design and development. And a land use plan of existing land covering uses and comprehensive plans for the most desirable utilization of the land.

In Nevada Revised Statute 278.250, the legislature said that a zoning district may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. And in subsection 2, the legislature said that zoning regulations must be adopted

in accordance with the master plan for land use. In subsection 4 of that section, the legislature said that in exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate.

Tab 31 of your documents is the American West case, which states that -- at page 807 that municipal entities must adopt zoning regulations that are in substantial agreement with the master plan.

Nevada Revised Statute 278.349 is not controlling here. In 1989 the State -- the Nevada Supreme Court issued the decision in the Nova Horizon case, where it said that zoning regulations must be in substantial conformance with the master plan. In 1991, the legislature amended NRS 278.250 to say that zoning regulations must -- it formally said shall -- the legislature amended that statute to say zoning regulations must be in conformance with the master plan. That's doubling down on the fact that the master plan is the highest authority in determining land uses.

In tab 18 of the City's records, the City's binder submitted to the Court, is Bill Number 2011-23, passed in 2011 by the City Council, Ordinance Number 6152 that amended the land use and rural neighborhoods preservation element of the general plan. This is also Exhibit P to the City's appendices

of exhibits. In that exhibit at page 317, Bates 317, is a diagram showing that the 35-acre property is designated PR-OS in the City's general plan. The PR-OS designation reads, The Parks/Recreation Open Space category allows large public parks and recreation areas, such as public and private golf courses, trails, easements, drainageways, detention basins and any other large areas or permanent open land. So under the City's master plan, which is superior to zoning and determines the land uses in the City, residential use was not permitted on the 35-acre property at any time relevant to this case.

At tab 49 is Section 19.00.040 of the City's Unified Development Code. It's part of the Las Vegas Municipal Code. That statute states, "It is the intent of the City Council that all regulatory decisions made pursuant to this title be consistent with the general plan. Consistency with the general plan means not only consistency with the plan's land use and density designations, but also consistency with all policies and programs of the general plan, including those that promote compatibility of uses and densities and orderly development consistent with available resources.

Tab 2 in the Court's binder is the Order of Reversal of th Nevada Supreme Court, which is also Exhibit DDD in the City's appendices. In that case the Nevada Supreme Court found with regard to the 17-acre property, "The governing ordinances require the City to make specific findings to

approve a general plan amendment, a rezoning application and a site development plan amendment." This indicates that the City has discretion as to -- the requirement that the City make specific findings to approve a general plan amendment means two things. Number one, the City had discretion as to whether to approve the amendment, and two, that the general plan in that case which designated the 17-acre property, like this property, PR-OS, would have to be amended to allow residential development. And that's the Nevada Supreme Court. We contend that that ruling is issue preclusive in this case and defeats any highest and best use of the 35-acre property as residential because residential is not legally permissible.

In tab 38, this Court's decision granting -- or denying the petition for judicial review. In this case the Court said that the developer -- page 18 -- the developer purchased its interest in the Badlands Golf Course, knowing that the City's general plan showed the property as designated for parks, recreation and open space, and that the Peccole Ranch Master Plan development plan identified the property as being for open space and drainage, as sought by the developer's predecessor.

The Court said in paragraph 41, "The General Plan sets forth the City's policy to maintain the golf course property for parks, open space and recreation," citing the Nova Horizon case. The Court went on in paragraph 42, "The

City has an obligation to plan for these types of things, and when engaging in its general plan process goes to maintain the historical use for this area that dates back to the 1989 Peccole Ranch Master Plan, master development plan presented by the developer's predecessor."

The Court said in paragraph 44 on page 19 of tab 39, "It is up to the council through it's discretionary decision making to decide whether a change in the area or conditions justify the development sought by the developer and how any such development might look." In paragraph 47 the Court said that "The City's general plan provides the benchmarks to ensure orderly development. A city's master plan is the standard that commands deference and presumption of applicability."

Then the Court -- at tab 30 in the Court's binder is the Stratosphere Gaming case, which said that "Under Section 19.18.050 the City Council must approve the Stratosphere's proposed development of the property through the City's site development plan review process. That process requires the council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that the Stratosphere had a vested right to construct the proposed ride."

Tab 26 of the City's binder is Unified Development Code Section 19.16.100. This is the site development plan

review provision of the City's UDC. And that provides that the City has very broad discretion in approving site development permits. That discretion is incompatible with a constitutional right to develop anything that the developer chooses within the black letter limits of the zoning.

Tab 27 is UDC Section 19.10.050, which is the RPD zoning section of the code. That provides that RPD district has been to provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space. So that section contemplates that there will be open space in an RPD district, as well as residential development. The City then designated the portions of the 611 acre part of the PRMP that was zoned RPD. It designated the residential portion as a residential designation under the general plan and then designated the open space, the golf course as PR-OS.

Tab 37 is a decision of the Ninth Circuit Court of Appeals involving the same parties, the same issue, and a final decision on the merits. There the court said, "To succeed on a procedural due process claim, a plaintiff must first demonstrate that he or she was deprived of a constitutionally-protected interest. To have a constitutionally-protected property interest in a government benefit such as a land use permit, an independent source such as state law must give rise to a legitimate claim of

entitlement that imposes significant limitations on the discretion of the decision maker." The Court said, "We reject as without merit plaintiff's contentions that certain rulings in Nevada state court litigation establish that plaintiffs were deprived of a constitutionally-protected property interest and should be given preclusive effect."

This was not a PJR case so it can't be distinguished on that basis. This was a constitutional challenge to the City's denial of a permit application, just like this case, making the identical arguments of this case that somehow zoning conferred a constitutional right to develop anything the developer chooses, as long as it's within the black letter limits of the zoning ordinance. This case should be applied as issue preclusion on the question of whether the PR-OS designation is valid and enforceable.

And finally, in tab 13, the Boulder City v. Cinnamon Hills Associates case, 110 Nev. 238, a 1984 case. The Nevada Supreme Court said there that in denying a due process challenge to the denial of a permit, a development permit, the Court said, "The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally-protected property interest." This is not a PJR law case, this is a case that's based on the underlying land use laws, as are all the other cases that hold that the City has

discretion as to whether to approve development of residential use on the Badlands property and are binding. Whether they're PJRs or not, PJRs are a procedural device. There is no substantive law in PJRs.

So the unanimous authority in Nevada is that there is no -- that whether a public agency has discretion that's not compatible, it cannot co-exist with a constitutional right to develop. The PR-OS designation is mandated by the State, is valid and enforceable regardless of the zoning.

Thank you, Your Honor.

THE COURT: Thank you, sir. And just as important, I think I just saved you some time because you did have an opportunity to read all that in the record.

Anyway, anything else you want to add? I'm sorry. Mr. Leavitt, go ahead.

MR. LEAVITT: Your Honor, I would -- I'll just say this. We'll incorporate all of our prior arguments in opposition to what Mr. Schwartz just said. And this Court's Finding Number 39, "The Court rejects the City's defenses that there's a Peccole Ranch Master Plan that governs the 35-acre property, and the City of Las Vegas Master Plan designation of PR-OS that affects the property interest determination."

The issue has already been fully briefed and fully decided. And I will just say this one last thing, Your Honor, and I'll close out here. It will take me one minute. In the

City of Las Vegas v. Bustos case, the City of Las Vegas made that almost verbatim exact argument that counsel just made. They said this, "This Court has held that a local government must defer to the master plan in making zone changes, and failure to do so results in reversible error."

And you want to know the cases the City cited to? The Nevada Supreme Court cites to them. The City of Las Vegas v. Bustos is an eminent domain case, right? And so the City cited to the supreme court these master plan cases and the Nova Horizon; the cases he just cited to you, the same ones. This is what the Nevada Supreme Court said. This is an inverse condemnation case, not a PJR case. It says, "The cases cited by the City are inapposite because they address enforcement of a master plan, not whether the district court should following zoning in an eminent domain case."

That's the issue, Judge. You followed zoning. You did the right thing. You excluded this PRMP, you excluded this PR-OS, consistent with Bustos, and your decision was right. And therefore, Your Honor, the Motion No. 3 should be granted to exclude the PRMP and the PR-OS.

THE COURT: All right. Okay. And as far as Motion in Limine No. 3 is concerned, we do have a well-developed record. And for the record, I'm going to go ahead and grant Motion in Limine No. 3, for all the reasons that have been set forth in the record previously. I'm looking at this. At this

point the open space dedication and the like is not relevant to the issue that the jury is going to be charged with starting tomorrow, once we get through voir dire and the like.

Okay. So where does that put us next?

MR. OGILVIE: Your Honor.

THE COURT: Yes?

MR. OGILVIE: This is George Ogilvie. If I could be heard?

THE COURT: Yes, you can.

MR. OGILVIE: So, first of all, let me apologize, Your Honor. I was in trial in Department 27 from September 20th to October 14th, so I missed the hearings on September 23rd, September 24th, the 27th and 28th, and have been also preparing for the arbitration hearing that I have next week.

So with that, I have to say that my ability to compromise (sic) in these proceedings has been somewhat compromised and is in large part the reason that Mr. Schwartz was making today's arguments. But I'm a little bit -- in preparing our case for trial, even preparing our opening statement, I have to get an understanding of what is and is not within the City's scope of defenses.

And I have to say that I'm surprised and chagrined to hear the argument made today that this -- there was a 2005 purchase option. The ability to purchase the -- and I say this because I took both -- Mr. Bayne's deposition and I

intended to present Mr. Bayne at trial. And I'm hearing that I'm not going to be able to present him and the evidence that he testified to during his deposition.

I also took Mr. Lowie's deposition and it was unequivocal from both of those depositions that there was no option that arose from these 2005 transactions that involved completely separate properties, Queensridge Towers, Great Wash Basin, which is Tivoli Village, and Sahara Commons. Those transactions had nothing, absolutely zero to do with the transaction for the purchase of Fore Stars or the 250-acre Badlands Golf Course, whichever way you want to characterize.

What happened was there was a 2007 letter of intent that distressed the purchase of the Badlands Golf Course that the developer in this case believed was breached, filed an action in 2007, Case Number A546847, against Fore Stars, which was -- [audio distortion; inaudible].

MR. LEAVITT: Your Honor, are we rearguing the motions? Are we rearguing the motions?

MR. OGILVIE: This letter of intent. And a settlement was entered into.

THE COURT: I think you're breaking up. Wait. Mr. Ogilvie, I'm not cutting you off. I can't hear you.

MR. OGILVIE: I apologize, Your Honor. I apologize Your Honor. There was a settlement agreement entered into in January 2008 which did a couple of things. One, it imposed a

restrictive covenant which said that the Badlands Golf Course will remain a golf course or open space and have no development activities upon it other than those activities expressly permitted by this agreement, unless consented to by Queensridge Tower, LLC. And then it also stated that there was a right of first refusal. There was never an option to purchase the Badlands Golf Course in favor of the developer. There was a right of first refusal. The documents are unequivocal that it was a right of first refusal to purchase the golf course that came from this January 2008 settlement agreement.

And it is undisputed that the membership purchase and interest -- membership purchase -- I'm sorry. Membership interest purchase and sale agreement that was dated December 1st, 2014 was for the purchase of this property, the -- originally the land that the golf course sat on but ultimately became the purchase of Fore Stars. It was entirely unrelated to any transaction in 2005. And, in fact, both Mr. Bayne and Mr. Lowie expressly stated under oath in their deposition that Mr. Lowie's entity or Mr. Lowie himself identified the purchase price for which the Badlands would be purchased. They identified it as seven and a half million dollars, which is reflected in the interest purchase and sale agreement, which has to be reduced by the three million dollars that was ultimately paid for the clubhouse on the golf course, and then

further reduced by the personal property that's identified in the purchase and sale agreement for Fore Stars, to bring the purchase price for the property, the 250 acres itself to less than four and a half million dollars.

And I had intended on presenting Mr. Bayne at trial to discuss exactly that. This 2014 -- December 1st, 2014 membership interest purchase and sale agreement that closed, by the way, on March 15th, 2015. And it is the evidence of the purchase price of less than four and a half million dollars for this -- the two and a half -- 250 acres.

So what I'm hearing, and I'm reading this -- I'm asking this, there's two parts to it. One, what I'm hearing is that we are prevented or prohibited from introducing any evidence of this 2015 purchase of Fore Stars for -- and the land, the 250 acres for less than four and a half million dollars. And then the second part is I had anticipated bringing in the evidence of the June 2015 letter of intent for the Calida Group to purchase the 17-acre property for $30,240,000. And --

THE COURT: Wait, wait, wait, wait, wait. I don't want to cut you off. It muffled when you said the figure. I don't know what --

MR. OGILVIE: The figure was $30,240,000. Now, it was my intention -- and again, it goes back to my disclaimer at the front. I apologize for not being able to participate

more, so I'm not exactly sure where we stand on those two issues, but I want to clarify where we stand on those two issues so I don't violate any Court orders. But what I think I'm hearing is with respect to the trial the City cannot introduce any evidence of the membership interest purchase and sale agreement that closed in 2015, and I cannot bring in any evidence of the letter of intent to sell the 17 acres to the Calida Group for $30,240,000 in 2015. Am I correct that those are the Court's rulings?

THE COURT: All right. You can -- has that even been brought up in this case on any level? I mean --

MR. LEAVITT: No, Your Honor. It's not even before the Court. Your Honor --

THE COURT: Go ahead. Go ahead.

MR. LEAVITT: First of all, I sat through both of those depositions. That was not what happened in these depositions, Your Honor. It's not what was said in these depositions. And, I mean, what I just heard from Mr. Ogilvie made it even more confusing of what may have happened. What we know, Your Honor, is -- what we just heard was argument from counsel. What we have in the deposition is, "Do you know whether Mr. Lowie had an option to purchase the property or a right of first refusal in 2006?" "From these documents we looked at today, it looks like he did." That's the seller. Mr. Lowie said, yes, I had an option in 2005. That's when

the price was agreed upon, Your Honor, is in 2005; number one. Number two, Your Honor, I don't want to go through it all again.

THE COURT: No, there's no need to.

MR. LEAVITT: Okay, Your Honor. I mean, I understand they're trying to make their record, Your Honor. Nothing that was said there should change this Court's order.

THE COURT: Okay. And -- go ahead, sir.

MR. OGILVIE: Your Honor, Mr. Leavitt conveniently cherry-picked some testimony from Mr. Bayne, and Mr. Bayne's testimony as a whole was very clear that the 2005 transactions had nothing to do at all with the 2015 purchase -- what ultimately resulted in the purchase of Fore Stars, which included the 250-acre Badlands Golf Course.

And if this is not subject -- if what I've just gone through is not subject to -- and Mr. Leavitt says it's not even at issue right now -- if these aren't subject to the Court's trial rulings or today's motions, then it seems to me that I'm able to bring this evidence forward in the trial.

THE COURT: All right.

MR. LEAVITT: Your Honor, we clearly filed a motion in limine to exclude the 2005 purchase price, so that's what's before the Court and that's what this Court ruled on.

THE COURT: All right. And, Mr. Ogilvie, for the record I granted Plaintiff's Motion in Limine No. 1, to

exclude the 2005 purchase price. Just as important -- and I think it's important to point out, and I realize you weren't involved in this, but one of the issues I really focused on would be essentially this. And understand this, we're not talking about issues of common knowledge that, you know, lay people can make a decision on. We're talking about complex real estate transactions involving potential real property that's going to be developed or alleged to be developed or the desire is to develop it.

And so when it comes down to just compensation in this case as it pertains to value, and the value date is going to be September 14th of 2017, my ruling has been fairly consistent in this regard, and this is one of the reasons why I denied plaintiff's motion for partial summary judgment on that issue dealt with admissible evidence.

But at the end of the day, and I just want to make sure you're clear on this, I would anticipate if that's relevant and/or germane to the valuation issue in this case that it would be supported or coupled with expert opinions as to why that's relevant, because that's what it's going to come down to, comparables. What's the value of the property at that date? And I'm looking for expert opinions on that. We have one expert, but we don't have one for the City. And so just to throw out figures, it would be akin to having potential injuries being introduced to the jury that's not

relevant to the claimed injury that the plaintiff is seeking recovery for.

And so the answer to your question would be yes, in the affirmative, it's not coming in. And the reason for it is this. I would -- and this is something that the court of appeals and/or supreme court is going to have to deal with. But in order to bring evidence such as that into this case, because it's being brought in to offer an alternative valuation, at the end of the day. That's what it is, an alternative value of this property. And you've got to have expert opinion on that. You just do. And I would anticipate you would have an expert opinion and say, look, Judge, this is why this is relevant to my valuation. We don't have any of that.

And so just to make sure I'm clear, and I'm glad you asked that question, Mr. Ogilvie, because I want to make sure I'm clear, too, as far as the thrust and focus of my decision making. This case is going to be about a valuation and that's what it's about. It's not going to be about taking issues. The sole issue is going to be just compensation and we're going to listen to the expert. And the City doesn't have an expert, and that just happens to be where we're at from a procedural perspective.

MR. LEAVITT: And, Your Honor, on that issue I have one other matter, if I could bring up really quick.

THE COURT: Yes.

MR. LEAVITT: We just received less than two weeks before trial that the City intends to call its former attorney in this case, Seth Floyd, as a witness. I mean, we need some direction on this. I mean, he was the attorney on this case and he was just disclosed two weeks ago to come in as a witness.

Secondly, Peter Lowenstein is not an appraiser. He was just disclosed. He's not an appraiser. He doesn't provide any valuation evidence. Keith Harper and a 2012 appraisal report that was done for estate purposes back in 2010, he was just disclosed about two weeks ago, saying that they were going to bring in a 2010 appraisal report that just valued the income from a golf course lease on the property. And then we just got notice that they're going to call William Bayne, and I think we've resolved that.

But we just got this two weeks ago, Your Honor. I haven't deposed -- none of them for value, by the way. None of them would -- Mr. Bayne said he doesn't know what the value of the property was in 2017; number one. Keith Harper says he hasn't done an appraisal report on this property as of 2017. He just valued a lease of income on a golf course in 2010 for estate purposes. And Mr. Floyd was the attorney in this case. And Mr. Lowenstein, he's a planner at the City. So none of these people have valuation evidence, Your Honor, and we just

got it two weeks ago. Your Honor, we kind of need some instruction that they're not coming in and testifying.

THE COURT: Mr. Ogilvie.

MR. OGILVIE: Well, let me -- let me address Mr. Floyd. The concern about an attorney testifying, it places the Court and the trier of fact in an awkward position. And it also places the witness in an awkward position if they're trying the case and then they're going to take the stand and testify about the case. And that's not the situation we have with Mr. Floyd. He is no longer the City attorney --

THE COURT: Well, sir, trust me, trust me, I don't want to cut you off, I really don't. It's really more fundamental than that. You can't disclose witnesses two weeks before trial and expect them to testify. I mean, that's in violation of Rule 16.1. That's in violation of my scheduling order that was issued in this matter pursuant to Rule 16 -- I think it's (D). Is it (D)? It doesn't matter. But it's in violation of so many issues because you just can't do that; right? You can't designate witnesses two weeks before trial, especially in this case. And this case is what now, four years old?

MR. LEAVITT: It is, Your Honor.

THE COURT: Right. And last but now least -- and here's the thing. And we have to remember the procedural history in this case. And I remember this with some detail

because there was an issue back in the spring of this year, I think it was, and I think there was -- I think Mr. Ogilvie sought Rule 56(d) relief or something like that and there was an issue regarding valuation. And so I wanted to open up discovery and let things occur so we're not dealing with it right now.

And I think the record is real clear on this in this regard. I gave both parties a full and ample opportunity to do what they needed to do in the prosecution and defense of this case. But if there's any witnesses designated two weeks before trial, I don't care about the merits of their testimony or anything like that. It's too late. I mean, this is a four year old case. They should have been designated a long time ago. And that's my decision. And so if they're going to be offered as witnesses in this case, they can't testify.

MR. OGILVIE: Your Honor, the declarations from both Mr. Lowenstein and Mr. Floyd were submitted in opposition to various landowners' motions. It's not a surprise. They were detailed declarations. And, in fact, the landowner has utilized Mr. Lowenstein's testimony from a different case in support of its motion for summary judgment. So there isn't any surprise with either of them preparing to testify at trial.

THE COURT: But how can that be? There's only a surprise if they're not listed as witnesses; right? I mean,

doesn't that have -- isn't that an important issue? I mean, you've got Rule 16.1. You're required to make a lot of disclosures. And you have interrogatory responses. I'm quite sure -- I would anticipate they would focus on who the witnesses you anticipate would testify at the time of trial. Because what happens there is really this straightforward and simple, that if somebody is designated as a witness to testify at trial, you conduct a different type of discovery when you take their deposition. It's just a different thrust; right?

MR. OGILVIE: Again, Your Honor, there isn't any surprise. And I would also add that the issues to be tried have evolved as a result of the Court's recent rulings. We are simply reacting to those. And because there's no surprise, all of those witnesses identified should be allowed to testify. And with respect to Mr. Bayne, Mr. Leavitt participated in the deposition of Mr. Bayne. There's no surprise that he would be a witness at trial.

THE COURT: Well, I can't speak for Mr. Leavitt, but I'll let him speak for a second on that issue.

MR. LEAVITT: Well, Your Honor, I asked Mr. Bayne one very specific issue and there was a reason I asked him. I said, Mr. Bayne, do you know what the value of the property is on September 14th, 2017? And his unequivocal answer was, Absolutely not. He said -- well, actually, I apologize, he said, "I do not." So he has no reason to even show up.

If he doesn't -- if we don't -- that's the only issue. What's the value of the property on September 14th, 2017. He has no information. We've excluded the purchase price. And so he shouldn't be permitted to testify, Your Honor. And, Your Honor, just because I take a deposition, if they don't list him it doesn't mean I'm not surprised. I mean, listen, if --

THE COURT: Well, and I will be a little bit more sophisticated than that. When you list someone as a witness, you take a totally different posture as far as discovery is concerned because you want to find out specifically if there's any testimony they might offer that would be adverse to your client's position. So you take a more in depth deposition, I would think.

MR. LEAVITT: Well, and even more important than that, Your Honor, had he said, listen, I know what the value of the property is on September 14th, 2017, then I would have gotten into it with him. What is it? Give me it all. But he said, no, I do not know. And that's the only issue. If he doesn't know, he's a lay witness, he's not an expert, so he can't bring any evidence to this trial that would be relevant in any way, shape or form, Your Honor.

THE COURT: And that's Mr. Bayne?

MR. LEAVITT: That's Mr. Bayne. He's a lay witness, not an expert, and he said he doesn't know what the value of the property is on September 14th, 2017. He did testify about

all of the transactions, but we've already excluded the purchase price. So it wouldn't be relevant to have him come in here and testify.

THE COURT: All right. And anything else you want to add, Mr. Ogilvie?

MR. OGILVIE: If the Court is excluding the purchase price of the 2015 transaction, that is -- that's the Court's ruling. But what I'm still not clear on is the evidence of the letter of intent from the Calida Group for the $30,240,000 purchase of the 17 acres.

MR. LEAVITT: Just very briefly, Your Honor. That's not been briefed before the Court. We did not bring a motion on that and neither did the City.

MR. OGILVIE: Okay. So then I would submit that it's open to introduction.

MR. LEAVITT: Your Honor, I can't go through everything I can possibly think of that the government might introduce. Obviously it would have to meet the threshold evidentiary standard, foundation, relevance, and then be admitted.

THE COURT: Mr. Ogilvie, at this point -- and for the record, we're talking about the letter of intent. Is that correct, sir?

MR. OGILVIE: Yes.

THE COURT: Okay. It hasn't been adjudicated yet?

MR. LEAVITT: Right.

MR. OGILVIE: The letter of intent from the Calida Group dated June 25th, 2015.

THE COURT: Yeah. It hasn't been adjudicated, sir.

MR. LEAVITT: I'm sorry, what date was it?

MR. OGILVIE: Okay.

MR. LEAVITT: I didn't hear. What date was it?

THE COURT: What date is it, Mr. Ogilvie?

MR. OGILVIE: June 25th, 2015.

MR. LEAVITT: Your Honor, I'm going to have to go look at that, obviously, to consider it.

THE COURT: I mean, we'll deal with it.

MR. LEAVITT: Yeah.

THE COURT: We'll deal with it.

MR. LEAVITT: All right.

(The Court confers with the clerk)

THE COURT: Yeah, there's two other matters regarding -- appear to be housekeeping. Motions to seal.

MR. LEAVITT: No opposition, Your Honor.

THE COURT: No opposition. Granted. All right. Before we break, because we have a one o'clock calendar or 1:30. What time?

THE CLERK: Yes, several. 2:00 p.m.

THE COURT: Okay, 2:00 p.m. So we have a little bit of time for lunch.

A couple things that are important to point out. It's my understanding we're going to be in the same courtroom we were in. That was Judge Krall. Is that correct?

THE CLERK: Yes.

THE COURT: We're going to be in her courtroom tomorrow. Starting at what time?

THE CLERK: 10:30, jury selection.

THE COURT: Jury selection, 10:30. How many are we bringing in, 45?

THE CLERK: I'm not sure of the particulars.

THE COURT: It's 40 or 45 are coming in. We have a wave coming in tomorrow and then another wave potentially the next day.

MR. LEAVITT: Okay.

THE COURT: What I will do is this. I mean, I do a traditional voir dire. The thrust and focus of my role is going to be very simple. Just, number one, make sure they understand why they're here and how important they are as far as the justice system is concerned. And secondly, I'll ask them a series of general questions, and what it accomplishes more so than anything would be simply this. I warm them up for you.

The questions I ask are not necessarily germane to any issue in the case, other than I want to make sure they understand and appreciate what jury instructions are and

they're going to promise to follow the instructions I give them. And I do spend some time on that because I think in many respects, you know, when we use legal terms or whatever like that, it would be just easier to call it the law. This is the law and you've got to promise to follow the law, because in essence that's what it is; right? And so, anyway, that's what we're going to do.

We start, again, at -- what time do we come in?

THE CLERK: 10:30.

THE COURT: 10:30. And I guess you can get in a little earlier and set up. Right?

THE CLERK: We do have a few matters at 9:00. We offered counsel an hour before, so 9:30.

THE COURT: 9:30.

MR. LEAVITT: Wait. So we show up at 9:30?

THE COURT: Yes.

MR. LEAVITT: Okay.

THE COURT: Ready to go.

MR. LEAVITT: Ready to go.

THE CLERK: Test equipment, etcetera.

MR. LEAVITT: Oh. So we can come in -- we can come in at 9:30 and test our equipment and then we'll start picking at 10:30. Is that what we're doing?

THE COURT: Yes.

MR. LEAVITT: Oh, okay. All right.

THE COURT: So in essence I'm trying to open up the courtroom because you want to come in, you might have placards or, you know, pictures and all these things that you want to bring in, because once we start you will be able to house certain things there. I mean, you're going to take your laptops and things like that, but, you know, exhibits you plan on using at the time of trial. I mean, I don't know what type of things you'll have in that regard, but you're free to set up. That's probably the best way to say it.

And just as important, too, have we considered jury instructions?

MS. WATERS: Your Honor, I have submitted our proposed jury instructions to the City and I haven't heard back from them.

THE COURT: All right. Well, that's something -- at least what we need to do is this. Before this week is up, I want to have both sides' proposed jury instructions so I can at least review them over the weekend.

MS. WATERS: Absolutely.

THE COURT: All right. Okay. With that in mind, I guess I'll see everyone. Prepare orders. And I will see everyone tomorrow. I guess we'll be ready to go, waiting on the jury at 10:30. It's at 10:30; right?

THE CLERK: 10:30.

THE COURT: Okay. Everyone enjoy your day.

MR. LEAVITT: Thank you, Your Honor.

MS. WATERS: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 12:22 P.M.

* * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
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| 180 LAND COMPANY, LCC,<br><br>Plaintiff,<br><br>vs.<br><br>LAS VEGAS, CITY OF,<br><br>Defendant. | ) | CASE NO. A-17-758528-J<br><br>DEPT. NO. XVI<br><br>**Transcript of Proceedings** |

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 27, 2021

**BENCH TRIAL**

APPEARANCES:

FOR 180 LAND COMPANY, LLC: JAMES J. LEAVITT, ESQ.
ELIZABETH GHANEM HAM, ESQ.
AUTUMN L. WATERS, ESQ.

FOR CITY OF LAS VEGAS: GEORGE F. OGILVIE, III, ESQ.
PHILLIP R. BYRNES, ESQ.
REBECCA L. WOLFSON, ESQ.

RECORDED BY: MARIA GARABAY, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

**LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 27, 2021, 10:24 A.M.**

* * * *

THE COURT: Come on up, counsel.

MR. LEAVITT: Thank you, Your Honor.

COURT RECORDER: We're on the record now.

THE COURT: We're back on the record.

MR. LEAVITT: Your Honor, we'd like to put an agreement upon the record, the agreement that we previously stated. We'll put it on the record at this time --

THE COURT: Okay, sir.

MR. LEAVITT: -- with the Court's permission.

THE COURT: Yes.

MR. LEAVITT: The parties have agreed to waive the jury trial in this matter and agree that this matter will be heard and decided by way of a bench trial by the Court.

Secondly, the landowners will move to admit the appraisal report by -- prepared by appraiser Tio DiFederico that values the 34.07 acre property as of September 14th, 2017. That appraisal report has been marked as Exhibit Number 5 and that's the report that will be admitted. The City will not object to the admissibility of the appraisal report prepared by appraiser Tio DiFederico, Exhibit Number 5.

Based on the Court rulings in this matter, including the property interest findings of fact and conclusions of law, the take findings of fact and conclusions of law, and the

City's motions heard on September 23rd, 24th, 27th and 28th, and the rulings on the three motions in limine and the countermotions for summary judgment on October 26th, 2021 and subject to the City's offer of proof that was stated on the record on October 26th, 2021, the City has no evidence to admit at the bench trial in rebuttal of the valuation by Mr. DiFederico set forth in his appraisal report, which has been marked as Exhibit Number 5.

The parties agree that following the admission of the Tio DiFederico report at the bench trial, the Court will decide the valuation of the real property taken as of September 14th, 2017, which is the date the Court recognized as the date of valuation in this matter. The City, however, would reserve its right to challenge that September 14th, 2017 date of valuation on appeal.

This matter does not involve the taking of nor valuation of any water rights the landowners or any entities owned by the landowners may or may not own. All appeal rights of the parties are preserved. All post-trial rights are preserved, including but not limited to requests for attorney's fees, costs, interest, reimbursement of taxes, etcetera.

Following the Court's ruling in this matter from the bench, the matter would proceed as follows. Number one, the denial of the motion for summary judgment and -- actually,

let me rephrase that. The denial of the motion and counter-motion for summary judgment and three motion in limine orders will be entered. Those were the motions that were heard just yesterday on October 26, 2021. Findings of fact and conclusions of law would be submitted to the Court for entry by the Court. And all post-trial matters would then be heard by the Court.

MR. OGILVIE: Your Honor, that's a correct statement of our agreement.

THE COURT: Okay. And so I understand regarding the agreement to waive the right to a jury trial at this time. I do accept that. Secondly, and I do understand the thrust and focus of the agreement and stipulation, and my next question is where do we go from here? Because it's my understanding the appraisal report is Proposed Plaintiff's Exhibit Number 5. Is that correct, sir?

MR. LEAVITT: That's correct, Your Honor. So what we'd like to do is we'd like to open up the bench trial at this time. Both parties would waive opening and we would submit the appraisal report of Tio DiFederico as evidence.

THE COURT: Okay. And in light of the stipulation, any objection to that, Mr. Ogilvie?

MR. OGILVIE: I just want to break that down a little bit. I agree we waive openings.

THE COURT: Yes.

MR. OGILVIE: They, 180 Land, the plaintiff, is submitting Exhibit Number 5. And I believe the Court is asking if the City has an objection. The City does not.

THE COURT: Okay. And that's what -- although we're truncating it, I'm making sure we follow all the formalities that we normally would do, just for the record.

THE CLERK: And so for the record, Number 5 is admitted, Judge?

THE COURT: So admitted.

THE CLERK: Thank you, Judge.

(Plaintiff's Exhibit Number 5 admitted)

THE COURT: All right.

MR. LEAVITT: Okay. And, Your Honor, based upon that appraisal report that Mr. DiFederico has appraised, or, I mean, submitted in this -- let me rephrase that. Based upon the appraisal report of Mr. DiFederico, which is Exhibit Number 5, which we have submitted as evidence, that appraisal report values the landowners' 34.07 acre property as of the relevant and statutory date of valuation, which is September 14th, 2017, at $34,135,000. And we would ask that the Court enter a judgment based upon that appraisal report in the amount of $34,135,000 as the fair market value of the 34.07 acre property as of September 14th, 2017.

THE COURT: And anything you want to add, Mr. Ogilvie?

MR. OGILVIE: So if we're going through a formal bench trial, I presume Mr. Leavitt is resting at this time.

MR. LEAVITT: We're resting.

MR. OGILVIE: So I have a statement to make which is exactly what Mr. Leavitt stated on the record preceding the opening of the trial.

Based on the Court's rulings in this matter, including the property interest FFCL, the take interest, FFCL, and the City's motions heard on September 23rd, 24th, 27th and 28th of 2021, and the rulings on the three motions in limine and the competing motions for summary judgment on October 26, 2021, and subject to the offer of proof stated on the record by the City on October 26, 2021, the City has no evidence to admit in rebuttal to the valuation report by Mr. DiFederico, Exhibit 5. And again would state that the City does not stipulate to the September 14th, 2017 date of valuation and reserves its arguments regarding that date of valuation.

With that, the City has no other evidence to submit in opposition and would rest.

THE COURT: Thank you, sir. I just wanted to make sure that was formal.

And, Mr. Leavitt, I think you get the last word and then I'll have one final comment.

MR. LEAVITT: I get the last word, Your Honor. The parties have waived closing, but in conclusion the landowners

request that as there's no other evidence to rebut Mr. DiFederico's valuation of the property, that judgment be entered in the amount of $34,135,000.

THE COURT: And as far as Exhibit Number 5, do you have a copy of that? And has that been placed as a court exhibit, sir, for this matter?

THE CLERK: Yes, Judge.

THE COURT: All right. All right. And so this is what I'm going to do in light of the current status of this matter. I have not had a chance, of course, to review the report at this point as evidence; however, I will do so. And I anticipate making a decision on or before Friday.

What's next Friday?

THE CLERK: Friday next week is the 5th.

THE COURT: Yeah, on or before Friday, November 5th at the close of business at five o'clock. It will be before then, but I'm just telling you I have to read the report, so.

All right. Anything else? What do you need, sir?

THE CLERK: Oh, yes. Just housekeeping on the trial exhibits, Judge. For all unoffered and unadmitted exhibits, can they be returned to counsel?

MS. WATERS: Yes.

MR. OGILVIE: Yes.

THE COURT: Is that a yes?

MR. OGILVIE: Yes.

THE COURT: All right. So it will be a yes.

THE CLERK: Thank you, Judge.

THE COURT: All right. Well, I guess there's no other action you need from me right now. Is that correct?

MR. LEAVITT: That's correct, Your Honor. And then following your ruling we would propose findings of fact and conclusions of law. Is that what we would do?

THE COURT: Absolutely.

MR. LEAVITT: Okay.

THE COURT: Yes. Absolutely.

MR. LEAVITT: All right.

THE COURT: Because what I'll do, just for the record so you know, I'm going to issue a minute order and that's how it will be. And pursuant to that minute order, I'm going to request that you prepare formal findings of facts and conclusions of law. All right?

MR. LEAVITT: So, Your Honor, just really quick, do you want us to submit findings of fact and conclusions of law prior to that or after?

THE COURT: After.

MR. LEAVITT: Okay.

THE COURT: After.

MR. LEAVITT: All right.

THE COURT: There's no need to do it right now. After, because I need to review the report.

MR. LEAVITT: Understood. All right, Your Honor. Thank you, Your Honor.

THE COURT: And in all probability the decision will be before Friday, but I just wanted to give myself time.

MR. LEAVITT: Sure. Understood.

THE COURT: Okay. All right.

MR. LEAVITT: Thank you, Your Honor.

THE COURT: Everyone enjoy your day.

MR. LEAVITT: You, too, Your Honor.

MS. WATERS: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 10:34 A.M.

* * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

Electronically Filed
2/7/2022 7:59 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
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| 180 LAND COMPANY, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>LAS VEGAS CITY OF,<br><br>Defendant.<br><br>AND RELATED PARTIES | CASE NO. A-17-758528-J<br>DEPT NO. XVI<br><br>**TRANSCRIPT OF PROCEEDINGS** |

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 19, 2022

**SEE NEXT PAGE FOR MATTERS**

APPEARANCES (Via BlueJeans):

FOR PLAINTIFF LANDOWNER: JAMES J. LEAVITT, ESQ.
ELIZABETH M. GHANEM HAM, ESQ.

FOR CITY OF LAS VEGAS: GEORGE F. OGILVIE, III, ESQ.
J. CHRISTOPHER MOLINA, ESQ.
ANDREW W. SCHWARTZ, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.



Case Number: A-17-758528-J

**M A T T E R S**

City's Motion for Immediate Stay of Judgment on OST

Plaintiff Landowner's Opposition to the City's Motion for Immediate Stay of Judgment and Countermotion to Order the City to Pay the Just Compensation Assessed

Plaintiff Landowner's Motion for Reimbursement of Property Taxes

Respondent's Motion to Retax Memorandum of Costs

**LAS VEGAS, CLARK COUNTY, NEVADA, JANUARY 19, 2022, 10:06 A.M.**

*** * * * ***

THE COURT: And next up, page 9 of the calendar, 180 Land Company, LLC, versus the City of Las Vegas.

Let's go ahead and set forth our appearances on the record.

MR. LEAVITT: Good morning, Your Honor. On behalf of the plaintiff landowner 180 Land, James J. Leavitt.

THE COURT: All right.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the City of Las Vegas.

MS. GHANEM HAM: Good morning, Your Honor.

MR. SCHWARTZ: Andrew Schwartz for the City of (video interference).

MS. GHANEM HAM: Sorry. On behalf of plaintiff 180 Land, Elizabeth Ghanem Ham.

MR. SCHWARTZ: This is Andrew Schwartz representing the City of Las Vegas. Good morning.

THE COURT: And for the record, does that cover all appearances?

MR. MOLINA: I'm sorry, Your Honor. I think I was on mute. This is Chris Molina appearing for the City.

THE COURT: Okay. Is there anyone else?

(No audible response.)

THE COURT: All right. And before we get started,

Staff, do you want to take just a five-minute recess real quick? I think you do.

UNIDENTIFIED SPEAKER: Please, yes.

THE CLERK: Use the rest room.

THE COURT: What we're going to do is I'm going to take five minutes. We're going to take a quick five-minute break before we get started with 180 Land Company, and so we'll go ahead and you can mute them, and we'll come back in about five minutes.

THE COURT RECORDER: Thank you.

(Proceedings recessed at 10:08 a.m., until 10:12 a.m.)

THE COURT: All right. We can go back on the calendar.

THE COURT RECORDER: We're back on the record.

THE COURT: Okay. I mean, thank you. And anyway, we're back on the record, and we have a few motions set for this morning and a continuation of the motion from last week or the week before, and I guess we probably should start out with the City's motion for immediate stay; is that correct?

MR. OGILVIE: That's good, Your Honor. This is George Ogilvie.

THE COURT: All right. And, Mr. Ogilvie, sir, you have the floor.

MR. OGILVIE: Thank you, Your Honor. Just for the Court's edification, I'll be arguing this motion. Mr. Schwartz

will be arguing 180 Land's motion for reimbursement of property taxes, and Mr. Molina will be arguing the City's motion to retax costs.

THE COURT: All right.

MR. OGILVIE: Your Honor, by this motion for stay of judgment, the City seeks a stay of the enforcement of the judgment pending the Court's adjudication of the City's Rule 59 and Rule 60 motion to amend and the disposition of the City's appeal, which the City will file immediately after the resolution of the City's motion to amend.

Under Rule 62(d) and 62(e), the City is entitled to a stay pending appeal as a matter of right without posting security.

Additionally though, the City is seeking immediate relief in the form of a stay pending the disposition of the motion to amend that the City filed pursuant to Rule 59 and Rule 60. The hearing on that motion to amend is scheduled for February 8th, and, as we have seen with Your Honor, the Court doesn't take long to rule on such -- well, just about any motion, and so --

THE COURT: And, you know what, Mr. Ogilvie, I kind of take that as a compliment in a way because I don't mind saying this, and, you know, I'm handling business court now, and before that it was construction defect, and a lot of these cases are very, very complex. And from time to time I do have

to take matters under submission, but what I try not to do is to sit on them for any excessive period of time because I understand the importance of these issues, and when I can, I try to rule from the bench. I just do, but it is what it is.

And I know this is a really important case. That's why wanted to -- issue I should say that's why wanted to move it where you didn't have to rush, and I'm going to hand the floor back over to you, sir, because I want to hear everything you have to say, and, of course, I'll hear from the opposition, but you have the floor, sir.

MR. OGILVIE: Thank you, Your Honor. And I'm sure just about every litigant and counsel that appears in front of you appreciates the efficiency with which you deal with such matters.

So, but my point being, the City's request for a stay pending the adjudication of the Rule 59 and Rule 60 motion to amend is a very brief stay that the City is requesting.

Again, the hearing is scheduled for February 8th. If the Court rules from the bench, obviously it'll just be a matter of fashioning an order to implement that ruling. If the Court takes it under advisement, as the Court has recognized, it doesn't do so for very long.

So what the City is essentially seeking, for purposes of a stay pending a motion to amend is, you know, roughly a month from today, and so, as I will discuss in later in my

argument, there really isn't any prejudice to 180 Land if the Court issued a stay pending the adjudication of that motion to amend. But additionally, as I stated, we're not only seeking a stay pending the adjudication of that motion, but pending appeal as well.

And I will go into the Rule of Appellate Procedure 8(c) factors, which also warrant a stay in this matter.

So what I'm not going to do today, Your Honor, is belabor the Court's decisions that were set forth in the motion and which the City takes issue. You know, we've made those arguments multiple times, and, as the Court has recognized, the Nevada Supreme Court will review whatever decisions that this Court has issued.

What I want to address today is very simply that a stay of execution of the judgment is appropriate to allow the Nevada Supreme Court to review those rulings before 180 Land is allowed to execute on the judgment.

So if we start with the -- I'm going to take it a little bit in reverse chronological order. And that -- so I'm going to address the request for a stay pending appeal first, and under Rule 62(d) and (e), the City is entitled to a stay pending appeal as a matter of right.

We look at Rule 62(d)(2), it says, If an appeal is taken, a party is entitled to a stay by providing a bond or other security.

And then if we look at Rule 62(e), it states, When an appeal is taken by the State or by any county, city, town or other political subdivision of the State or an officer or agency thereof, the operation or enforcement of the stay -- of the judgment is stayed. No obligation, bond -- no bond, obligation, or other security is required from the appellant.

So if I break that down, it says, and break that down and apply it to what's before the Court today, Rule 62(e) says when an appeal is taken by the City and the operation or enforcement of the judgment is stayed, no security is required from the City. And if I then go back to Rule 62(d)(2) and it says again, If an appeal is taken, a party is entitled to a stay by providing a bond or other security.

So I looked up the word entitled. *Merriam-Webster* defines it as having a right to certain benefits or privileges. So if we apply Rule 62(d) and (e) to what's before the Court today, under Rule 62(d)(2), the City has a right to a stay, and under 62(e), no security is required from the City to obtain that stay.

Now, the Nevada Supreme Court has addressed this, and affirmed my arguments in the case *Clark County Office of Coroner Medical Examiner versus Las Vegas Review-Journal*, and the Court said, Upon motion, as a secured party, the State or local government is generally entitled to a stay of a money judgment under rule -- NRCP 62(d) without posting a supersedeas

bond or other security.

So I submit to the Court, Your Honor, that the only issue before the Court today is whether a stay should be granted pending the adjudication of the City's motion to amend. In accordance with Rule 62(d) and (e) and the Clark County Office of Coroner case that I just referenced, the City is entitled to a stay as a matter of right when it files its notice of appeal.

Had the City filed its notice of appeal yesterday or any time in the last month, it would be entitled to a stay as a matter of right without posting any security, but the City, and let me just for the Court's edification, I'm sure the Court is aware of this, had the Court filed or had the City filed a notice of appeal prior to adjudication of the motion to amend, the Supreme Court would have found that the motion or the notice of appeal was premature and would either -- would have required the City to voluntarily dismiss the notice of appeal.

Nonetheless, the point is, if the City didn't file the motion to amend, the City would have already filed a notice of appeal and would have been entitled to a stay as a matter of right.

Now, we also mentioned in the brief in our motion that the City is also requesting that the Court stay other decisions of the Court, namely the October 12, 2020, findings of fact and conclusions of law regarding the plaintiff

landowner's motion to determine the property interests, the October 25th, 2021, findings of fact and conclusions of law granting the plaintiff landowner's motion to determine take and for summary judgment on the first, third and fourth claims for relief and denying the City of Las Vegas, Las Vegas's countermotion for summary judgment on the second claim for relief, and, thirdly, the October 28, 2021, decision of the Court.

As I will argue in a couple of minutes, there isn't any prejudice to 180 Land if the Court granted a stay on the money judgment as well as the three rulings that I just referenced to allow the Nevada Supreme Court to review the Court's decisions on these four very momentous issues.

What the City -- what 180 Land has obtained is a money judgment, but in addition to seeking that money judgment, 180 Land has already contended that this Court's rulings, the three rulings that I just mentioned, are an issue preclusion bar to a local agency's exercise of discretion to deny or condition its approval on any application to develop property in Nevada as long as the proposed development is first permitted by the zoning. Without a stay of the three decisions that I referenced, the 180 Land will continue to assert this argument, and it already has, and we referenced that in our briefs. 180 Land has already sought to bar any discretion by the other three Judges overseeing these inverse condemnation

cases in the Eighth Judicial District Court by asserting issue preclusion. In other words, 180 Land has sought to take all discretion away from those other judges based on this Court's rulings that I referenced earlier.

The City submits that those Courts should be granted the discretion to rule as they deem fit under the facts and circumstances of the cases before them, that it is inappropriate for 180 Land to seek issue preclusion based on this Court's rulings, and therefore those rulings should be stayed pending a review by the Nevada Supreme Court.

So getting to the Rule of Appellate Procedure 8(c) factors, there's four factors. If the Court is inclined to examine further, does not grant the City's request just based on Rule 62, the Court -- Nevada Supreme Court reviews the request for a stay based on four factors.

The first factor is whether the object of the appeal will be defeated if the stay is denied. The second factor is whether the appellant will suffer irreparable or serious injury if the stay is denied. The third factor is whether the respondent will suffer irreparable or serious injury if the stay is granted, and the last factor is whether the appellant is likely to prevail on appeal.

Now, Your Honor, I'm not going to focus on the fourth factor, whether the appellant is likely to prevail on appeal. Based on the hearings, the multiple hearings that we've had

with Your Honor, I understand that the Court truly believes the rulings that it has made are sound and not going to be overturned on appeal. So I think it would be futile for me to try and convince the Court at this stage that the City is likely to prevail on appeal.

But I also want to point out that the Supreme Court -- Nevada Supreme Court has recognized that if one or two of these four factors are particularly strong, they may counterbalance other weak factors.

So taking the fourth factor out of the argument for purposes of today, I would submit to the Court that the other three factors are especially strong and weigh in favor of the City such that the Court should grant the stay.

Now, I'm going to just briefly address each one of the other three factors. The first factor, again, whether the object of appeal will be defeated if the stay is denied. So if Your Honor denies the stay and allows 180 Land to execute on the $34 million judgment and the other rulings, which for which the City or the 180 Land is seeking issue preclusion, the City and every other community in the State of Nevada could suffer irreparable harm if the stay is denied because property owners could claim a constitutional right to build anything they want as long as it complies with local zoning while the City's appeal is pending.

So the object of the -- part of the object of the

appeal, the nonmonetary aspect of the City's appeal would be defeated if the stay is denied, and the 180 Land is allowed to proceed to seek issue preclusion while the Nevada Supreme Court has yet to review this Court's decisions.

The second factor, whether the appellant will suffer irreparable or serious injury if the stay is denied, if the stay is denied, the City would be required to pay 180 Land $34 million in principal, plus the additional $50 million plus in prejudgment interest, attorneys' fees, property taxes and costs. But if the Nevada Supreme Court later reverses the judgment, the City is unlikely to retrieve the money paid to 180 Land because 180 Land is going to take the money and spend it, invest it, do whatever it seeks to do with that 34 million, and the likelihood of the City to recover that 34 million -- and again it's not just 34 million. The 180 Land is also seeking an additional 50 million.

So call it 80 million. The City coffers would be depleted by 80 million that the City is unlikely to retrieve if the Developer is entitled to execute on the judgment while the Nevada Supreme Court reviews this Court's decisions.

The third factor, whether the respondent will suffer irreparable or serious injury if the stay is granted, with respect to the money judgments, its only monetary damages that 180 Land would not suffer irreparable harm if a stay is entered. The $34 million judgment continues to accrue interest

and until the Nevada Supreme Court either affirms or reverses the -- this Court's decision, that interest would continue to accrue. The City isn't going anywhere, and that's why we have Rule 62(e) that does not require a municipality to post security pending appeal.

The State legislature and the State Supreme Court recognized that the municipality is going to be good for whatever judgment is ultimately rendered after a review by the Nevada Supreme Court. Therefore, with the judgment continuing to accrue interest, there is no harm or irreparable harm to 180 Land if a stay is issued.

So, Your Honor, simply the Nevada Supreme Court should be allowed to review this Court's decisions and resolve these critical issues of law before the City is required to part with $80 million of taxpayers' money.

The City seeks an order staying the rulings and the execution of judgment through the disposition of the City's appeal.

And therefore, we ask that the Court grant the motion to stay pending this Court's adjudication of the City's motion to amend. And rather than bring another motion for stay pending appeal, we're asking for that at this time as well.

THE COURT: Okay. Thank you, sir.

And we'll hear from the opposition.

MR. LEAVITT: Good morning, Your Honor. James J.

Leavitt on behalf of the plaintiff landowner 180 Land.

Your Honor, the arguments that Mr. Ogilvie just made have been made several times to the Nevada Supreme Court in the past. They were made in a published decision called second -- or *State versus Second Judicial District Court*. That decision was decided in 1959, Your Honor. It's been the law in the State of Nevada for 62 years. That case is based upon two specific statutes that were adopted to apply specifically to this type of case, an eminent domain case.

NRS 37.140 and NRS 37.170 were adopted to address the very arguments that Mr. Ogilvie presented to the Court. Judge, keep in mind where NRS 37.140 and .170 appear.

First of all, they appear in Title III of the Nevada Revised Statutes. Title III of the Nevada Revised Statutes applies to special actions and proceedings. Then the legislature took that special action and proceeding of eminent domain and adopted a specific law to apply in the specific context that we're in right now. Not only do we have NRS Chapter 37 appearing in Title III, which is special actions and special proceedings, but we have specific law within Chapter 37 to apply to the very specific issue that we're here for today.

37.140 is not unclear, Your Honor. It says the plaintiff must -- mandatory language -- within 30 days after final judgment, pay the sum of money assessed.

37.170 then closed the loop in the event the City or any other governmental entity decides to appeal, and if the City or any other governmental entity decides to appeal, 37.170 then says, as a precondition to appeal, the City or any other governmental entity must pay the sum of money assessed.

Section 2 of NRS 37.170 is real clear: "The defendant, who is entitled to the money paid into court for the defendant on any judgment..."

Your Honor, that says any judgment. It doesn't even use the words final judgment. It's says, if the City decides to appeal, the defendant is entitled to be paid that money pending appeal.

And then Section 1 says that any time after entry of judgment, and if the government is in possession of the property the government must pay the sum of money assessed pending appeal.

Now, the arguments that we just heard from Mr. Ogilvie were presented to the Nevada Supreme Court in *State versus Second Judicial District*, and the State of Nevada had to -- was in the same exact position that the City of Las Vegas is in right now, and the State of Nevada argued to the Nevada Supreme Court that it should not be required to pay the money on a verdict pending appeal.

The first argument that the State of Nevada says, Judge, our appeal will be defeated. The subject of our appeal

will be defeated if you don't give the -- if you don't give yourself, the Nevada Supreme Court the opportunity to review the lower court order before ordering payment.

The Nevada Supreme Court rejected that argument and said, listen, we're just requiring you to pay the money. You can still bring your issue before us, and if you prevail, then you can collect the money back, and on that issue, here is what the State said to the Nevada Supreme Court.

The State said that in any event that the construction is placed upon the State, which requires the State to pay that money, it would be an undue burden, and this is the undue burden the State argued in the eminent domain case to the Nevada Supreme Court:

> That a seeking to get the money back from a condemning, that which it should never have had and may have already squandered.

The exact argument that Mr. Ogilvie just made to you, the State of Nevada made to the Nevada Supreme Court and said, listen, the landowner may squander the money, and we may have to get that back.

Here's what the Nevada Supreme Court did. The Nevada Supreme Court did a balancing, and they had to make a public policy decision. They had to balance the City and the State's undue burden, as they describe it, of having to collect the money back in the event the matter is reversed or unless

judgment is paid against the landowner's constitutional right to timely be paid just compensation, and clearly, Your Honor, you can see what the Nevada Supreme Court did. They said, This is a burden which must be borne by every judgment debtor who appeals in absence of supersedeas. We do not regard such burden as unjust.

And here's what the Court said: When balanced against the condemnee's right to prompt compensation for property already taken.

The Nevada Supreme Court also rejected the other public policy arguments that were just made by Mr. Ogilvie, and here's how they did it. They said, the power not only to take possession of another's property, but also to postpone indefinitely the payment of just compensation is a power which may very well have an oppressive effect.

So what the Court did is they looked at the landowner's constitutional right to payment of just compensation, the oppressive effect a delay of payment may have on that landowner and weigh that against the government's arguments that were just presented by Mr. Ogilvie, which I won't repeat, and said that the landowner's constitutional right to prompt payment and just compensation far outweighs any of the arguments made by the government.

Here's what the Court said in regards to interest, because Mr. Ogilvie made the argument this is just about money.

This is just in -- they can get paid in interest.

The Court said the assurance of ultimate payment, plus interest may not be sufficient to meet the immediate needs of the condemnee either to his property or to his cash equivalent. In other words, the Court said, you cannot take property and then delay payment for that taking. It will have an oppressive impact on the landowner.

And, Your Honor, as you will recall during all of these proceedings, I have one consistent argument, and my consistent argument was, Judge, this case is having a crushing impact on our client. I repeatedly argued. I said, Judge, we need to get this case resolved, and I agree with Mr. Ogilvie. You quickly resolved it. Your decisions were very quick, but the City delayed this matter for four years.

Judge, we filed this case in 2017. We are now four and a half years after the property has been taken, four and a half years where the City tried to remove the case to federal court and delayed it. They delayed the summary judgment hearing because they wanted to get an economic analysis and then showed up at the summary judgment hearing saying they didn't need the economic analysis, that they used as a reason to get the delay.

Your Honor, I just want to -- I'm not going to belabor this point, but I will cite to one exhibit that we submitted during the summary judgment hearing. It's Exhibit

Number 143, and this is an e-mail that we discovered through a Freedom of Information Act request. It's an e-mail that was sent by the head of the surrounding property owner.

Listen to what the head of the surrounding property owner said, and as you'll recall, Your Honor, the entire case was about the City of Las Vegas working with the surrounding property owners to preserve this landowner's property for use by the surrounding property owners by denying a fence, by denying access, by passing a bill to authorize the public to use the property and absolutely prohibiting the landowner from using the property so that it can be preserved for the surrounding property owners.

This is what the head of the surrounding property owners in Exhibit 143 stated in an e-mail: We have done a pretty good job of prolonging the developer's agony from September 2015 to now. Judge, that's four and a half years. We have done a pretty good job of prolonging the developer's agony. That's what this motion is about here today. The Nevada Supreme Court has held that once a judgment is entered in an eminent domain case, that judgment must be paid so that the landowner's agony can be no longer prolonged.

And the agony is, Your Honor, that landowner has lost all use, all value of their property. The City has the property. The City has taken the property. That's the law of the case right now is the City has taken the property.

As you'll recall in the findings of fact and conclusions of law, a councilman said to all the surrounding property owners, This 250-acre property is yours for Parks and Recreation use. He then followed up on that and sponsored a bill to allow the public to use the property. And then we presented evidence through Don Richards's affidavit and numerous photos that the public was actually using the property at the direction of the City of Las Vegas.

Your Honor, this is no different than the City filing a condemnation action to take a property for a public park so the public can use it.

The City is in possession of the property, and the public is using the property pursuant to the law of this case.

And, Your Honor, as I stated, this has been the law for 62 years. The City of Las Vegas has had every opportunity, along with every other governmental, go to the Nevada Legislature and try and change this law. It either has tried to do it, and the legislature refused, or it has not done it because it knows the legislature will not reverse this law. It is a very specific law that applies over the general NRCP Rule 62 and NRAP 8 rules.

Your Honor, I'm not going to go into the NRAP elements, and the reason I'm not going to, because I just addressed them in *State versus Second Judicial District*. The exact same NRAP Rule 8 elements were argued to the Nevada

Supreme Court in *State versus Second Judicial District*, and the Nevada Supreme Court rejected every one of them and gave a specific and detailed policy reason for why NRAP 8 does not apply in this type of case.

Now, what the City has argued is, Judge, if you don't do this, the sky is going to fall, and those aren't my words that I used. Those are the words that the United States Supreme Court uses. The United States Supreme Court has heard these arguments, that if you rule in favor of a landowner, Judge, the sky is going to fall. If you order payment of funds, the sky is going to fall.

That argument was made in *Sisolak* to the Nevada Supreme Court, and this is what the Court held in Footnote 88: The Court rejects the County's contention that it cannot afford a taking finding.

And then the Court goes on to say, Any financial burden that the county must bear is irrelevant as to whether there has been a constitutional violation and a taking.

So any of these burdens that we're hearing from the City, they're entirely irrelevant to the constitutional issue of whether there has been a taking.

Your Honor, in *Arkansas Game and Fish versus U.S.*, a case that was written by Ruth Bader Ginsburg, she addressed this exact issue that the City presents about the sky's going to fall. Here's what she said in *Arkansas Game and Fish*:

> The slippery slope argument, we note, is hardly novel or unique. Time and again, in takings cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest.

In other words, she's saying, we hear this argument all the time from the government. And this is what she said, quote, "We have rejected this argument," end quote.

Then she went on to explain how the sky did not fall after *Cosby* (phonetic), which was a United States Supreme Court decision, and then she goes on to say that our decision today will not result in a deluge of takings liability.

Judge, we can't base constitutional rights on whether the government thinks the sky is going to fall. I mean, sometimes it's hard to comply with the Constitution.

For example, it's hard to comply with the fourth amendment sometimes for the government. Does that mean that we need to erase the fourth amendment? Does that mean the right -- an individual's right against search and seizures should be erased because it's hard on the government? That's never been a proper argument, and it has been repeatedly rejected by the Courts, and it's been repeatedly rejected by the United States Supreme Court in the specific context of eminent domain cases.

Now, I believe what Mr. Ogilvie is going to do is when I finish arguing he's going to say, Judge, NRS 37.140 and NRS 37.170 only apply to direct condemnation cases. They don't apply in the context of an inverse condemnation case.

Let's take that. I'm going to address the case law on that in just a moment. But, Your Honor, let's take that to its logical argument.

So what the City is arguing is that if the City had properly followed the law, if the City had properly filed a condemnation action, then the City would be required to pay the funds as a precondition to appeal and within 30 days.

But the City says since it acted illegally and unconstitutionally and didn't file a proper condemnation action, and the landowner had to sue the government to get the take finding, it should get a break and should not have to pay the funds pending appeal. That's the City's argument, and that argument has been repeatedly rejected by the Nevada Supreme Court.

As you'll recall, during all these proceedings, the City of Las Vegas has argued that eminent domain and direct condemnation law does not apply. That exact issue has been resolved in two cases. I'll address them briefly, Your Honor.

The first one was the 1984 *County of Clark versus Alper* case. The case Mr. Waters did, and that case the issue was a date of valuation, and Mr. Waters argued to the Nevada

Supreme Court that NRS 37.120, that Chapter 37 that applies in Title III in the specific context of an eminent domain case applies equally to eminent domain cases and inverse condemnation cases, and the Nevada Supreme Court agreed, and here is what the Court said.

Inverse condemnation proceedings are the constitutional equivalent of direct eminent domain actions. That means they are identical.

And the Court went a second step and then said they are governed by the same rules and principles that are applied to formal condemnation proceedings.

The Nevada Supreme Court didn't say some of the rules and principles apply. They said that the inverse condemnation and direct condemnation cases are the constitutional equivalent of one another and the exact same rules and principles apply.

Now, *Alper* was an inverse condemnation case where direct eminent domain law was asking to be applied.

I want to refer the Court now to a 1998 -- I believe it's a 1998 case, yeah, *Argier versus Nevada Power Company*. This is a direct eminent domain case, and we represented the landowner in that case also, and in that case the issue was what is the -- which party was entitled to be paid compensation.

And in that case, that direct eminent domain case, we cited to the Nevada Supreme Court an inverse condemnation case

called Brooks Investment. I can't remember the exact name of it, but the case right now, Your Honor, but it was, yeah, Brooks -- *Brooks versus City of Bloomington*. So that *Brooks versus City of Bloomington* case was an inverse condemnation case that we were trying to apply in a direct condemnation action, and Nevada Power Company said, Judge, you shouldn't apply inverse condemnation law in a direct condemnation case, and here's what the Nevada Supreme Court said 14 years after *Alper*. It said this Court has held that the same rules that govern direct condemnation actions apply in inverse condemnation actions as well.

Therefore, Your Honor, we can have a lengthy discussion about NRAP 8. We can have a lengthy discussion about NRCP 60 and 62, but the Nevada State Legislature has decided to adopt very specific rules regarding payment of funds in an eminent domain case, and they supersede NRAP 8. They supersede NRCP 60, and those rules apply equally in an eminent domain case, as they apply -- a direct eminent domain case as they apply in an inverse condemnation case.

But, Your Honor, to allow the City to stay payment for another one, two, I don't know, maybe three years, would continue to have a profoundly oppressive effect on the landowners, despite with the City argues. The landowners have already had carrying costs of taxes at $1 million a year imposed by the City Tax Assessor. They've already had to pay

their attorneys for four and a half years. They've already had to pay all of the carrying costs of a vacant piece of property. They paid taxes based upon a lawful residential use that the City would not allow them to make of it.

And now the City, after a judgment is entered, wants to delay this matter further. I can't impress upon you how much of a further financial crushing impact that would have. And as the Nevada Supreme Court described it in *State versus Second Judicial District*, it would have an oppressive. That's the Nevada Supreme Court's words, not mine, but an oppressive effect. This is what the Court concludes:

> It might well through duress of circumstances compel the acceptance by a condemnee of compensation felt not to be just.

What the Court is saying there is it might well result in the landowner taking less than their constitutional right to just compensation, meaning, their constitutional rights would be denied.

And just one minute, Your Honor.

Mr. Ogilvie makes the argument that everything has to be stayed because other Courts might apply your ruling. Your Honor, we have specific laws on issue preclusion in the State of Nevada. What another Judge may or may not do has no bearing before this Court right now. There's no reason to stay any of the judgments.

They have been litigated for over four years. I don't think they could be any further litigated, and therefore, Your Honor, there's absolutely no reason to now start staying judgments, and particularly start staying payment, Your Honor.

Therefore, we would ask that this Court order payment of the -- all of the sums assessed within 30 days of the judgments of those sums being assessed under 37.140 and 37.170 in *State versus Second Judicial District*, Your Honor.

And Your Honor, I would answer any questions if you'd like me to.

THE COURT: None at this time, sir. I'll have some questions once Mr. Ogilvie is done.

MR. LEAVITT: All right. Thank you, Your Honor.

THE COURT: And I understand, and for the record, I don't mind saying this, I understand the importance to all parties involved as far as this issue is concerned. I do. I get it. And I've been listening, and I'm going to listen to Mr. Ogilvie. Then I'll have a -- I might have a question or two after he's done.

MR. LEAVITT: Okay.

THE COURT: Mr. Ogilvie, sir.

(No audible response.)

THE COURT: Did we lose him?

MR. LEAVITT: George, we can't hear you.

THE COURT RECORDER: He's muted, Your Honor.

THE COURT: Yeah, hit star 4, Mr. Ogilvie.

MR. OGILVIE: Sorry. I didn't want to make any noise that would disturb Mr. Leavitt.

Your Honor, what we heard was a fairly emotional plea by 180 Land's counsel as to the effects of not staying this judgment. If we want to go back and argue the facts, I'll make a couple quick statements about the facts. When we're talking about the oppressive effect that Mr. Leavitt argued, the oppressive effect on an entity that purchased the entire property, the entire 250 acres for less than $3.5 million. So the oppressive effect of a stay is -- first of all nonexistent because it is simply a monetary judgment. And even if it was existent, it is -- the stay rulings affecting a purchase of three and a half million dollars.

Mr. Leavitt argued about the City delaying the proceedings by the removal and the delay to the motion -- 180 Land's motion for summary judgment. The City stands by the removal, Your Honor, the *Knick* case that came down from the Nevada Supreme -- or from the U.S. Supreme Court in 2020 or 2019, which stated that a landowner no longer needs to go to state court. It can go directly to federal court for an adjudication of an inverse condemnation proceeding. The City maintains that it was appropriately read to allow the City to then remove the case as new law.

Nonetheless, I don't want to belabor that point.

We've had the rulings on that. I'm just making the point, Your Honor, that the City's actions in this litigation, and particularly the argument that we delayed the proceedings by removing them to federal court were, I submit, legally sound and were engaged in no means for purposes of delay. The argument that we delayed the motion for summary judgment to obtain an economic analysis and then didn't proceed with one, that's not the case.

We also sought the stay to have the opportunity to review the merit of Mr. Richards's declaration that there were -- there was a public intrusion on the property, which there was no evidence of other than some select photographs taken by Mr. Richards; but also to take Mr. Lowie's deposition, which we took on August 12th, and it was critical for not just this case, but all of these Badlands cases that we take Mr. Lowie's deposition before any motion for summary judgment brought by 180 Land be heard.

And we brought forth evidence in our motion for summary judgment based on Mr. Lowie's deposition that in fact the City's argument that the -- that 180 Land purchased the property for less than three and half million dollars, again, not just the 35 acres, the entire 250 acres for less than three and a half million dollars was, in fact, validated and confirmed by all of the documents that we presented in Mr. Lowie's deposition. So the City has not delayed these

proceedings, and this is not an attempt to unfairly or oppressively delay the collection of a judgment.

The City's intention is to allow the Nevada Supreme Court to review these critical issues before $80,000 -- or $80 million, pardon me, $80 million or thereabouts, depending upon the Court's rulings on the remaining posttrial motions, before that money is taken from the taxpayers and awarded to the 180 Land in this case.

It is, again, imperative that the Nevada Supreme Court have the opportunity to review these proceedings. It is -- notwithstanding Mr. Leavitt's arguments about eminent domain, and I'll take those in a second, it is indisputed (sic) that Rule 62(d) and (e) allow a municipality such as the City to take and appeal and obtain a stay pending that appeal without the posting of any security.

As it relates to NRS 37.140 and 37.170, Mr. -- I agree with Mr. Leavitt when he said the law -- this law is very specific. It is very specific. It's specific solely to eminent domain, the eminent domain. This is not an eminent domain case.

The issue here that the City will take up on appeal is whether 180 Land had a constitutional right to approval of the applications at issue and whether there was a taking. The appeal isn't an acknowledgment that the City had actually exercised its right to eminent domain and improperly or

properly valued the property that was taken.

We're not -- the issue of value is not the appellate issue. The appellate issue, again, is whether 180 Land had a constitutional right to approval of the applications and whether there was a taking. That is not an eminent domain case, and the eminent domain law cited by Mr. Leavitt does not impact the City's right to entitlement to a stay pending appeal without the posting of security.

The -- of the -- Mr. Leavitt argued that there's no reason to stay these decisions, that other Court's decisions should not impact this Court. Well, that's diametrically opposed, completely contrary to the motions that 180 Land has brought in other cases, in the other inverse condemnation cases regarding the Badlands, in which 180 Land and its affiliates are citing this Court's three decisions that I referenced in my opening statements as having precedential effect, precluding any further consideration by those other departments on the issues addressed in these -- this Court's October 12th findings of fact, October 25th findings of fact and the October 28th decision.

So for Mr. Leavitt to argue that this -- that the other Court's decisions do not impact this Court is completely contrary to the positions that 180 Land and its affiliates are taking in before those other courts.

Your Honor, the rule, Rule 62 is very clear. The

City is entitled to a stay pending appeal. The only issue before this Court is whether or not that stay should extend to the time period pending the adjudication of the City's motion to amend. As I submitted in my opening statements, we're about a month away from that. There isn't a significant delay. Therefore, we request that the Court grant the motion, stay the execution of judgment and stay the other decisions issued by this Court pending the Court's adjudication on the City's motion to amend and also grant the stay as a matter of right to the City pending appeal.

THE COURT: All right. Is that it, Mr. Ogilvie? Because I do have some questions for you.

MR. OGILVIE: Thank you.

THE COURT: And, I mean, I, without question, considered, you know, in a normal circumstance, I understand the application of NRS-- I'm sorry, NRCP 62(e). I get that.

I do understand the Nevada Rules of Appellate Procedure 8C. I get that and the factors that were set forth therein.

But tell me this, and I was reading -- I remember reading the reply -- I'm sorry, the opposition. I think it was filed in this matter. Let's see if I can find it real quick by 180 Land Company, and I have a couple questions when I look at this, these issues, and my first, and this is an overall observation, and I remember I was reading it at page 8 of the

opposition, and according to page 8, 180 Land Company or the landowners would take the position that, for example, quote, the more specific eminent domain statutes and apply -- and laws apply over a general rule cited by the City.

I actually think it's probably a slightly different issue, and I just remember from time to time researching this issue when you have a conflict between statutory rights granted by the Nevada Legislature versus rules, you know, as adopted by our Nevada Supreme Court, and it can be a rule of civil procedure, an EDCR or whatever, and so to me, there potentially -- there appears to be a tension between rules of procedure versus substantive rights or grants by the Nevada Legislature.

And I don't think that was necessarily addressed head on, but if that is the case here, I guess I should say, Number 1, is that the case here where we have a grant of substantive rights pursuant to NRS Chapter 37.140, and I think the other one is .170 versus NRCP 62(e) and also Rule 8 under the Nevada Rules of Appellate Procedure, and I'm going to give both of you a chance to address that issue.

We can start first with you, Mr. Ogilvie.

MR. OGILVIE: Your Honor, the City submits that the Court need not even engage in that because Chapter 37 does not apply to these proceedings. Chapter 37 is eminent domain. This is an inverse condemnation action, and I understand that

the -- I understand 180 Land's position and arguments that the Nevada Supreme Court has ruled that the principles of eminent domain also apply to inverse condemnation proceedings.

But the fact remains, Your Honor, that they are very, very different proceedings. The only issue in an eminent domain proceeding is value.

The issues in this case, in an inverse condemnation action are far, far more complex. And again, whether or not the 180 Land as the Developer had a constitutional right to the approval of its applications and whether there was a taking, those are not included in eminent domain proceedings. Once that is determined, then -- and all we're talking about is value on the -- on an inverse condemnation action, I will agree that eminent -- that the proceedings are very similar, and principles of eminent domain can be applied to inverse condemnation proceedings.

But prior to a determination as to whether or not there is a taking, there is no similarity in these proceedings, and therefore, there is no application of rule -- of Chapter 37, eminent domain proceedings to inverse condemnation proceedings.

Now, secondarily, Your Honor, I would refer the Court to NRS 37.009, specifically, Subsection 2, and it defines final judgment as a judgment which cannot be directly attacked by appeal, motion for new trial or motion to vacate the judgment.

Until there is, in fact, final judgment, which is referenced in NRS 37.140, that the -- there is no right to payment of the judgment pending appeal.

So 37.140 requires payment of just compensation only after entry of a final judgment, and again, NRS 37.009, Sub 2 defines what final judgment means, and if you read that currently, currently, there is not a final judgment because this judgment, the judgment entered by this Court in October is subject to appeal, and therefore, under 37-point -- 37.009, Sub 2, it is not a final judgment, and as such, NRS 37.140 does not require payment at this time.

THE COURT: All right. I understand that, Mr. Ogilvie. Anything else you want to add, sir?

MR. OGILVIE: No, Your Honor.

THE COURT: Okay. And, Mr. Leavitt, sir.

MR. LEAVITT: Yes, Your Honor. I'll start with Mr. Ogilvie's final argument there on the definition final judgment. Mr. Ogilvie is correct, but he left off a portion of the statute. This loophole that Mr. Ogilvie just argued was closed by the Nevada Legislature in 1959 when it adopted NRS 37.170.

So what the Court -- what the legislature found is that arguments like Mr. Ogilvie's were being made, and so the legislature adopted 37.170 and said at any time after entry or of judgment and left off the word final judgment, it said any

time after entry of judgment or pending an appeal by either party from the judgment that the award must be paid, and so the Nevada -- or the Nevada Legislature erased the word final from 37.170, and then if you turn to 37.009, judgment is defined. And judgment is defined as, in 37.009, judgment means the judgment determining the right to condemn property and fixing the amount of compensation to be paid by plaintiff.

So once that judgment is entered and the government takes an appeal from that judgment, a precondition to that appeal is that the government must pay the sum of money assessed.

Again, Your Honor, that's set forth not only in NRS 37.170, but it's set forth in *State versus Second Judicial District Court* where the Court specifically states, it specifically states very clearly, Your Honor, that the deposit provided in 37.170 is a condition to condemnor's right to maintain an appeal.

Well, the Court has already interpreted 37.170 and determined that the legislature closed that loophole that Mr. Ogilvie just argued to assure that the payment is not delayed.

And, frankly, the argument that Mr. Ogilvie just made shows the legislature's intent, shows how strongly the legislature felt about assuring that landowners are timely paid just compensation.

Your Honor, I'll refer very quickly the Court to the findings of facts and conclusions of law regarding the take, and it's page 40, Finding Number 200. The Court cites to the Knick case.

This is the quote from the Knick case. Once there is a taking, compensation must be awarded because as soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion or regulation, the landowner has already suffered a constitutional violation, and they gain an irrevocable right to be paid just compensation.

And so the delay here, Your Honor, violates that constitutional right to be paid immediately upon occupancy, physical invasion or regulation because a landowner has already suffered that constitutional violation.

Now, let me go to the first, which was your original question is, an overall observation, page 8. You're absolutely right, Your Honor. On page 8, you go to the bottom, and the page 8 near the bottom, we cite *Doe Dancer versus LaFuente*. In that case the Court had two conflicting statutes and held the general specific canon is that when two statutes conflict, the more specific statute will take precedent and is construed as an exception to the more general statute.

The *City of Sparks versus Reno Newspaper* is an accepted rule of statutory construction that a provision, which

specifically applies to a given situation will take precedence over one that applies only generally.

Admittedly, the City has to admit that NRAP 8 and NRCP Rule 60 apply generally, and NRS Chapter 37 applied to special proceedings. And one of those special proceedings is eminent domain.

THE COURT: Well, actually, Mr. Leavitt, I don't want to cut you off, sir, but my observation is slightly different in this regard. It appears to me we have substantive rights granted pursuant to this statute based upon the laws being enacted by the Nevada Legislature and signed off by the Governor. We all know how a bill becomes law, right, going back to --

MR. LEAVITT: Understood.

THE COURT: I forget who did that. Was that the electric company, whatever it was.

MR. LEAVITT: (Video interference) company.

THE COURT: Yes. But my point is this. Here we don't have a statutory conflict with another statute. We have a statutory conflict with the rule, and that was my overall question because in a general sense, when a rule, and, I mean, when a statute involves a substantive right, that would take precedence over a rule and -- from the procedural perspective.

And that was kind of what my observation was, that we had a scenario where potentially you had a -- you do have a